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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-

~~75-5960~~

ALBERT LEWIS CAREY, JR.,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA

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STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on October 7, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 288 N.C. 254, 218 S.E.2d 387 (1975) and is set out in Appendix A hereto, pp. 1a-20a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on October 7, 1975 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S. C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the trial court's limitation of petitioner's cross-examination of the State's principal witness violated petitioner's right to confront the witnesses against him and his right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

3. Whether petitioner's oral statement to a police polygraph operator, made during custodial interrogation, should have been excluded because it was involuntarily given, having been obtained through psychological coercion, in violation of petitioner's rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the fcllowing provisions of the General Statutes of North Carolina:

§14-17 (repl. vol. 1969):

> "Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt

to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." 1/

§14-87 (repl. vol. 1969):

"Robbery with firearms or other dangerous weapons. - Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapons, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

§15-176.3 (repl. vol. 1975):

"Informing and questioning potential jurors on consequences of guilty verdict. - When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential

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1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

juror whether that person understands the consequences of a verdict of guilty of that crime."

§15-176.4 (repl. vol. 1975):

"Instruction to jury on consequences of guilty verdict. - When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

§15-176.5 (repl. vol. 1975):

"Argument to jury on consequences of guilty verdict. - When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

§15-187 (repl. vol. 1975):

"Death by administration of lethal gas. - Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (repl. vol. 1975):

"Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on October 7, 1975, affirming petitioner's conviction and death sentence for first degree murder[2/] and his conviction

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2/ Petitioner's sentence of death was imposed under N.C.Gen. Stat. §14-17 (repl. vol. 1969) (murder) as construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature subsequently enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), effective April 8, 1974, which slightly altered the definition of first degree murder. The new first degree murder statute, now codified as N. C. Gen. Stat. §14-17 (1974 supp.), provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

The 1974 legislation, however, is not involved in this case (the constitutionality of death sentences imposed under this 1974 law is at issue in Woodson & Waxton v. North Carolina, No. 75-5491 (filed September 24, 1975), pending on petition for certiorari). For the North Carolina Supreme Court has expressly held, with three Justices dissenting, that the enactment of that legislation did not affect death sentences imposed under the anterior State v. Waddell procedure. State v. Williams, 286 N.C. 422, 212 S.E.2d 113, 119-120 (1975)(affirming a death sentence for rape). Subsequent to its Williams opinion, the court has affirmed death sentences imposed for first degree murders committed before April 8, 1974, with Chief Justice Sharp dissenting on the grounds expressed in her dissent in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 747-750 (1974), and with Mr. Justice Copeland and Mr. Justice Exum dissenting on the grounds expressed in their dissents in State v. Williams, 286 N.C. 422, 212 S.E.2d 113, 121-123 (1975). See, e.g., State v. Wetmore, 287 N.C. 344, 215 S.E.2d 58 (1975); State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975).

and sentence of ten years imprisonment for conspiracy to commit attempted armed robbery.[3/] Petitioner Albert Lewis Carey, Jr., a black man, was convicted and sentenced on December 19, 1974, after a trial in the Mecklenburg County Superior Court, for the murder of James D. Sloop, Sr., and for entering into a conspiracy to rob Mr. Sloop with a shotgun.

Petitioner, his brother Anthony Douglas Carey, James Calvin Mitchell, Antonio Dorsey, and Harold Givens were indicted for murder, armed robbery and conspiracy to commit attempted armed robbery, as a result of a June 19, 1973 armed robbery of the Williams' Exxon Service Station in Charlotte, North Carolina, during which James D. Sloop, Sr., was shot to death. R. 2-6.

3/ Criminal conspiracy is not defined by statute in North Carolina, but "a conspiracy to commit a felony is a felony," State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25, 28 (1941). "A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme -- the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. The conspiracy is the crime and not its execution. . . No overt act is necessary to complete the crime of conspiracy . . .'As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete.'" State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, 348 (1964). Moreover, "'a conspiracy to commit a crime is not merged in the commission of the completed offense, but is a distinct offense of itself and punishable as such, notwithstanding its object, the attempted crime, has been accomplished.'" State v. Brewer, 258 N.C. 533, 129 S.E. 2d 262, 281 (1963). See generally, State v. Albert Lewis Carey, Jr., 285 N.C. 509, 206 S.E.2d 222, 224-225 (1974).

The State prosecuted petitioner and his brother for first degree murder and, in 1973, both were convicted (at separate trials) and sentenced to death. Mitchell was the State's key witness against both Careys. Reviewing petitioner's 1973 conviction, the North Carolina Supreme Court observed:

> "the testimony of Mitchell, the trigger man at the shooting, is ample to support a finding that he, the two Carey brothers, Harold Givens and Antonio Dorsey conspired to rob Williams' Exxon Service Station; that this defendant - Albert Lewis Carey, Jr. - was the principal planner of the robbery; that, in his own or his wife's automobile, he transported all of the conspirators to a point near the filling station where he let Mitchell and Givens out for the purpose of perpetrating the planned robbery; that they went to the filling station and, in an attempt to carry out the plan, Mitchell fatally shot James Sloop, an attendant thereat; following the shooting, Mitchell and Givens fled and were picked up by this defendant and transported back to their homes in his automobile."

State v. Albert Lewis Carey, Jr., 285 N.C. 509, 206 S.E.2d 222, 224-225 (1974)(this opinion is attached as Appendix C, infra).

The State dismissed the charges against Givens and Dorsey,[4/] and accepted a plea of guilty to second degree murder and to armed robbery from Mitchell, who was sentenced to forty years imprisonment, R. 11, 27. See also R. 22-23.

On appeal, the Supreme Court of North Carolina

4/ State v. Harold N. Givens, Mecklenburg County (North Carolina) Superior Court No. 73-CR-61590 (judgment of nonsuit granted, November 27, 1973) (see State v. Albert Lewis Carey, Jr., 288 N.C. 254, 218 S.E.2d 387, 390 (1975)); State v. Antonio Dorsey, Mecklenburg County (North Carolina) Superior Court No. 73-CR-61587 (nolle prosequi entered, December 19, 1974).

reversed the convictions and death sentences of both Careys, State v. Albert Lewis Carey, Jr., supra; State v. Anthony Douglas Carey, 286 N.C. 497, 206 S.E. 2d 213 (1974)(this opinion is attached as Appendix D, infra), because the trial court had prohibited defense counsel from informing the jury during jury selection and in closing argument that the "mandatory" punishment for first degree murder was death.[5/]

The State chose not to retry Anthony Douglas Carey, and all of the charges against him were dismissed.[6/]

Petitioner, however, was brought to trial again for first degree murder and for conspiracy to commit attempted armed robbery and was convicted of both charges on December 19, 1974 and was sentenced to death for first degree murder. On October 7, 1975, the Supreme Court of North Carolina affirmed petitioner's convictions and sentences, with three Justices dissenting in regard to the death penalty. State v. Albert Lewis Carey, Jr., 288 N.C. 254, 218 S.E. 2d 387 (1975)(this opinion is attached as Appendix A, infra).[7/]

5/ The principle that the jury in a capital case may be informed, as a matter of right, upon voir dire, in closing argument, and in the trial court's instructions that the punishment for first degree murder is death was first articulated in State v. Britt, 285 N.C. 256, 204 S.E. 2d 817 (1974), and has now been codified. See N.C. Gen. Stat. §§15-176.3, 15-176.4, 15-176.5 (repl. vol. 1975). See also Petition for Certiorari, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974) at 52-60; State v. Bell, __ N.C. ___, 214 S.E.2d 53 (1975).

6/ State v. Anthony Douglas Carey, Mecklenburg County (North Carolina) Superior Court No. 73-CR-46179 (nolle prosequi entered, December 19, 1974).

7/ On October 20, 1975, Chief Justice Sharp stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court.

The State's evidence against petitioner consisted exclusively of a statement he made to Charlotte Police Department polygraph operator W.O. Holmberg while petitioner was being preliminarily examined for the taking of a polygraph examination on July 11, 1973, at approximately 9:00 a.m.[8/] According to Holmberg petitioner refused to take the polygraph test and said "that had something he wanted to discuss with me." R.41. Petitioner

> "stated to me that the night prior to the Exxon incident, which occurred at Trade and Cedar Streets, that he, in the presence of a subject named Givens and Mitchell had planned this robbery . . . .
>
> He also stated that on the date of the incident that he had his wife's automobile and that he himself had driven Givens and Mitchell to the intersection of Trade and Clarkson and let both of them out with the understanding that they were going to rob the place."

8/ The previous day, July 10, 1973, petitioner had signed an agreement to take a polygraph test "for the mutual benefit of myself [petitioner] and the Charlotte Police Department". R. 45. Holmberg apparently advised him that the results of the test were inadmissible in North Carolina, ibid. but he did not tell him that "the conference with me could be used as evidence against him." R. 46. Petitioner was hooked up to the polygraph machine and some "pre-test" questions were asked him. but Holmberg decided that the test could not be successfully administered "due to . . . [the drugs] he [petitioner] had partaken of the night before," R. 46.

On July 11, 1973, at approximately 8:15 a.m., Detective Whiteside and another Charlotte police officer (Detective Starnes, who did not testify at petitioner's trial), gave petitioner the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966) and obtained from him a signed waiver of counsel. R. 39. These two officers questioned petitioner for approximately half an hour and he denied any participation in the robbery of the Williams' Exxon Station. Ibid. Detective Whiteside testified that he had been instructed by a superior to "bring Carey over and question him. Sergeant Painter told us to bring him to the Criminal Investigation Bureau and interview him and if we got no results to take him back." R. 58. After the two officers had unsuccessfully questioned him, they took petitioner to the polygraph room, where they secretly watched his interview with Holmberg through a two-way mirror. R. 59. Holmberg did not advise petitioner of his Miranda rights: "I asked him if he had

R. 51.[9] Holmberg also showed petitioner a list of armed robberies which had recently occurred in the Charlotte area and asked him to check those in which he had been involved. Petitioner checked a number of these incidents, including the June 19, 1973 robbery of the Williams' Exxon Station. This list was entered into evidence with all of the check marks blocked out except the one by the Exxon Station robbery. R. 48, 52. One other Charlotte policeman, R.J. Whiteside testified that he had observed the July 11 conversation between Holmberg and petitioner, and he confirmed Holmberg's account. R. 57.

When Officer Holmberg first took the stand, the State elicited over petitioner's objection, R. 37, the fact that he was assigned to the police polygraph unit, R. 36, and that his July 11, 1973 conversation with petitioner occurred in the

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8/ cont'd.

been advised of his rights. He stated that he had been advised by the Detective[s] Starnes and Whitesides[sic]." R. 41. None of the officers who questioned petitioner informed him that he faced a possible death sentence; the Miranda waiver petitioner signed stated that "I am being questioned in regard to the crime of murder and armed robbery which is punishable by imprisonment." R. 49, R. 136-137.

9/ Before admitting into evidence petitioner's statement to Holmberg, the trial court held a hearing outside the presence of the jury to determine the voluntariness of the statement. At the conclusion of this hearing, the trial court made written findings, R. 46-49, that the statement was admissible. See n.27, pp. 36-37, infra.

polygraph room, R. 38. When defense counsel attempted to cross-examine Holmberg concerning the circumstances under which he had taken this statement, the trial court ruled that any probing by defense counsel of the conditions under which the statement was taken would entitle the State to bring out on redirect examination all the facts about the attempted polygraph test, R. 55-56.

The State called James Calvin Mitchell(who was fifteen years old at the time of the crime) as a witness, but Mitchell recanted his earlier testimony that petitioner had been involved in the robbery of the Williams' Exxon Station. He testified that he was alone when he went to rob the Exxon Station on June 19, 1973, although a person who wanted to buy a soft drink entered the station with him. R. 28. Mitchell said he "told the man [who worked in the station] to freeze and give me all he had. Then he went for a gun and I shot him. After I shot him I went across the fence and ran." Ibid. The State was permitted to treat Mitchell as a hostile witness,[10/] but he consistently denied petitioner

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10/ After a hearing held outside the presence of the jury, the trial court made the following findings:

> "(1) The witness, James Calvin Mitchell, has pleaded guilty to Second-Degree Murder in the killing of James D. Sloop, Sr., on June 19, 1973, and is presently serving a sentence in the Department of Correction for that offense.
>
> (2) That, the witness Mitchell was called as a witness for the State in

was involved in the robbery in any way. He recalled giving

10/ cont'd.

> the case of STATE v ANTHONY DOUGLAS CAREY at the 29 October, 1973, Schedule "A" Session of the Superior Court for Mecklenburg County. At that time he testified in substance that he, Albert Lewis Carey, Jr., Anthony Douglas Carey, Harold Givens and Antonio Dorsey planned to rob the Exxon filling station located on West Trade at Cedar Street in the City of Charlotte; that, the defendant, Albert Lewis Carey, Jr., supplied him with a sawed-off shotgun and transported him to the vicinity of the station in his automobile; that, he and Givens went to the service station with the intent to rob it, and that he there shot James D. Sloop, Sr., with the sawed-off shotgun; That, he and Givens then ran back to the automobile driven by Albert Lewis Carey, Jr., and were transported from the scene.
>
> (3) The witness Mitchell thereafter testified at the trial of STATE v HAROLD N. GIVENS. At that trial he testified that he had taken no part in the armed robbery and that he was at his home at the time it occurred.
>
> (4) The witness Mitchell testified at the first trial of Albert Lewis Carey, Jr., at the 26 November, 1973, Session of the Superior Court for Mecklenburg County in substance as he had at the trial of Anthony Douglas Carey.
>
> (5) After Court had recessed on November 16, 1974, Mr. Gilchrist and Mr. Coffield, of the Mecklenburg District Attorney's office, met with the witness Mitchell, his mother and Officer Thompson of the Charlotte Police Department. The witness Mitchell was given a transcript of his testimony in the prior trial of this case and asked to review it page by page. He stated that there were only two minor discrepancies. Mr. Coffield then inquired of him how he would testify at this trial, as he did at the trial of Givens or as he did at the first trial of this case. The witness replied that he would let them know 'in the morning.'

contradictory testimony at the petitioner's earlier trial, but declared that "[t]he reason I wouldn't give the same answer [today] to the questions as they are written in the . . . [transcript of petitioner's first trial] is because what is written there is not true. What's in there is what that man, Gilchrist [the district attorney], told me to say." R. 31. 11/

10/ cont'd.

> (6) At about 9:00 a.m. December 17, 1974, Mr. Coffield and Mr. Gilchrist met with the witness. The witness Mitchell stated that he would testify in this trial as he had in the first trial of the case.
>
> (7) Upon being sworn to testify for the State in this case, the witness testified in substance that on June 19, 1973, he went to the Exxon service station. That, he thought the man was going for a gun. That, he shot him, ran to Irwin Avenue and then to Seaboard Avenue. That he messed around, played around and then went home. He further testified that he had walked to the Exxon station. That, the boy who was with him had gone to get a soft drink, and that when he, Mitchell, pulled the gun, that boy ran.
>
> (8) Based upon the assurance from the witness Mitchell, the State was reasonably entitled to rely upon the fact that he would testify in this case substantially as he had done upon the first trial of the case, and the State was taken by surprise by his testimony."

R. 11-13.

11/ When Mitchell was excused, the trial judge made the following statement, outside the presence of the jury:

> "Mr. Gilchrist, I will want a Bill of Indictment presented to the Grand jury in January for perjury against this witness, either on the basis of

The owner of the Exxon Station, Mr. Freeman B. Williams, testified that he and his employee, James D. Sloop, Sr., were closing the station at about 7:00 p.m. on June 19, 1973, when two young men entered the station. One had what "appeared to be a 16 or 20 gauge sawed-off shotgun," R. 24, and he pointed this weapon at Williams. One of the intruders said "'Gimmee'" to Williams and Sloop replied, "'Oh boy, I wouldn't give you anything.'" Ibid. The intruder with the sawed-off shotgun whirled and shot Sloop in the stomach, and both intruders then ran out of the station, without taking anything.[12/] Williams identified James Calvin Mitchell as the person who had shot Sloop, R. 25, but he added that petitioner "was not at my station, to my knowledge. I did not see him. I don't think he was the other person I saw, because the other person was not as tall as he is." ibid.

11/ cont'd.

> his testimony in the first trial, or, preferably, on his testimony in the Givens case in which he denied that he was present at this station on this occasion. I intend to write a letter to the Board of Paroles recommending that he serve every day of his sentence to which he is subject, and never be paroled, because one way or another, I do not know what the truth is, but one way or another, he has made a fool of the entire criminal justice system, and I will strongly urge that he never be paroled. Take him away, Sheriff. Bring back the jury."

R. 31-32.

12/ Petitioner and the State stipulated that Sloop died on July 3, 1973, of the shotgun wound he received on June 19. R. 10.

A witness who lived across the street from the Exxon Station testified that at about 7:00 p.m. on June 19, 1973, he heard a shot and saw two persons fleeing from the station, but he was unable to identify the men. R. 26. A box of 20 gauge shotgun shells was entered into evidence. R. 33. This box had been found in a kitchen drawer at petitioner's sister's house on the night petitioner was arrested there, but there was no evidence that petitioner ever had possession and control of these shells or even knew of their existence. The officer who found the shells admitted "There is nothing peculiar about the shells I found. . . You can buy these kind of shells at most any hardware store." R. 33. A firearms expert testified that four lead pellets taken from Mr. Sloop's wound were number six shot, but this expert had not examined the shells found at petitioner's sister's house and he was unable to say whether the shot in these shells resembled the four shot taken from Sloop's wound. R. 36.

Petitioner testified in his own defense and stated that he was at his father-in-law's house at the time of the Sloop shooting. R. 62. He denied any participation in the attempted robbery of the Exxon Service Station, R. 61, said he had never met James Calvin Mitchell before his July 10, 1973 arrest, ibid., and denied making any inculpatory statement to Officer Holmberg and putting check marks and his initials on the list of armed robberies shown him by Holmberg. R. 65. Petitioner's wife testified that on the day of the

Sloop murder, she and petitioner drove to her father-in-law's house in the early afternoon. R. 67. Her father-in-law invited petitioner to his house, and petitioner said he would return as soon as he took his wife somewhere else. R. 68. Petitioner then dropped his wife off and returned to pick her up some hours later that evening. Ibid. Petitioner's wife also denied having known Mitchell before petitioner's arrest. R. 69. Petitioner's father-in-law confirmed that petitioner had come to his house "late . . . in the afternoon [of June 19, 1973]," R. 78, and remained there, drinking beer and playing cards, until "[l]ater on in the evening," R. 79. This witness also testified that he lived near the Williams' Exxon Station; he saw several carloads of police arrive there early in the evening, but stated that petitioner was at his house at that time. Ibid.

The State called two witnesses in rebuttal. The mother of James Calvin Mitchell testified that petitioner had been in her house prior to July 9, 1973 "at least a dozen times" and that petitioner and his wife frequently drove by to pick Mitchell up. R. 80. A Charlotte police officer who was investigating several robberies in June and July 1973 testified that he had interviewed petitioner's wife and had taken statements from her relating to other robberies. In these statements, she said she had ridden in a car with petitioner and "with a boy named Peanut [Mitchell's nickname]." R. 85.[13/]

13/ Chief Justice Sharp and Mr. Justice Branch dissented from the decision of the North Carolina Supreme Court that admission of the two statements given by Mrs. Pamela Carey did not constitute reversible error. These two Justices noted that the two statements "strongly suggest that . . . [petitioner] was involved in . . . [two other] robberies with Mitchell and others." State v. Albert Lewis Carey, Jr., 288 N.C. 254, 218 S.E. 2d 387, 405 (1975).

> "Assuming arguendo that whether Pamela knew "Peanut" Mitchell on June 8th and 9th was material and

The jury was instructed that it could return verdicts of guilty or not guilty of first degree murder and guilty or not guilty of conspiracy to committ attempted armed robbery. R. 127, 125. The trial court also informed the jury that "first degree murder is a capital offense under the law of North Carolina and that the death penalty is mandatory upon a verdict of guilty." R. 125. The jury found petitioner guilty of first degree murder and conspiracy to commit attempted armed robbery, and the trial court imposed sentences of, respectively, death and ten years imprisonment. R. 130, 132.

13/ cont'd.

> not collateral to the issue whether defendant participated with him in the robbery on June 19th, the sole purpose for which these exhibits were admissible might have been attained by exercising [sic] all portions of the statements except those to the effect that Pamela knew Mitchell and was with him and others on June 8th and June 9th of 1973. The instructions that the jury exclude from their consideration the prejudicial effect of these exhibits upon the credibility of defendant and upon his guilt was a futile gesture. See State v. Gardner, 226 N.C. 310, 37 S.E. 2d 913 (1946)."

Id., 218 S.E. 2d at 405-406. Because of this violation of state law, these two Justices would have reversed and remanded for a new trial.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. After petitioner's death sentence for first degree murder was imposed, petitioner moved to arrest judgment "because the statutes of North Carolina under which the defendant has been sentenced in this case are unconstitutional under the State of North Carolina and the Federal Government." R. 131. The motion was denied, ibid., and petitioner assigned this ruling as error, R. 135. The North Carolina Supreme Court rejected this claim:

> "Finally, defendant complains that it was error for the trial judge to enter the judgment of death. Defendant contends that the death penalty is not authorized under the Constitution and the statutes of North Carolina. This Court has heretofore considered and a majority has consistently rejected all of the arguments on this point and does so here . . .
>
> No useful purpose would be served in reiterating the reasons for the above decisions. The death sentence was the only one that the court below could impose upon a conviction of first-degree murder under authority of State v. Waddell, supra."

State v. Albert Lewis Carey, Jr., 288 N.C. 254, 218 S.E.2d 387, 404 (1975).

II. Petitioner objected to the trial court's ruling that any mention by petitioner of the circumstances surrounding the polygraph examination would "open the door" to a complete presentation of these circumstances by the State, but his objection was overruled. R. 55-56. Petitioner assigned as error "[t]he limiting, by the Court, of the . . . [petitioner's] right to cross examination of the Stat 's witness, W.O. Holmberg." R. 133. The North Carolina Supreme Court rejected this claim:

> "Defendant next contends that the trial court committed prejudicial error in limiting defendant's right to cross-examine the witness W.O. Holmberg.

> The question involved is intertwined with the admissibility of defendant's inculpatory statement. Defendant contends that he was faced with a choice of either letting the alleged statement go into evidence unchallenged or of examining Officer Holmberg concerning the circumstances surrounding the alleged statement and thereby bringing out further evidence concerning the polygraph examination. Accordingly, defendant concludes he was "boxed in" and such a choice deprived him of the right to effectively cross-examine Holmberg concerning the circumstances under which defendant's statement was made. . . .
>
> Judge Snepp did not infringe upon defendant's right of cross-examination by any means."

State v. Albert Lewis Carey, Jr., supra, 218 S.E.2d at 398-399.

III. Petitioner objected to the admission of the statement he had given to Officer Holmberg on the ground that it was involuntarily made, but after a hearing out of the presence of the jury, the trial court overruled this objection. R. 46-51. Petitioner assigned this ruling as error, R. 133, but the Supreme Court of North Carolina rejected this claim:

> "Based on the evidence produced on voir dire, the trial judge found facts and made conclusions of law to the effect that defendant freely and voluntarily made the statement and admission as the State contended. There was ample evidence to support the trial judge's findings, and those findings in turn support the trial judge's conclusions that defendant freely, understandingly, voluntarily, and intelligently made a statement and admission to Officer Holmberg on 11 July 1973, without undue influence, coercion or duress, and without any promise, threat, reward, or hope of reward; that he had been fully advised of his constitutional rights and understood those rights; and that after being advised on these rights, he knowingly and intelligently waived his right to the presence of counsel at the time he made the inculpatory statement and admission."

State v. Albert Lewis Carey, Jr., supra, 218 S.E.2d at 396.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has granted certiorari to consider a similar question in Fowler v. North Carolina, No. 73-7031, and in order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts here the arguments and authorities contained at pp. 26-140, Brief for Petitioner, Fowler v. North Carolina, No. 73-7031 (attached as Appendix B, infra.)

This case dramatically illustrates the capriciousness and arbitrariness with which the death penalty is being administered under North Carolina's post-Furman v. Georgia, 408 U.S. 238 (1972) capital procedures. Under the law of North Carolina, "when a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." State v. Fox, 277 N.C. 1, 175 S.E.2d 561, 571 (1970). A grand jury indicted petitioner and four others for conspiring to commit armed robbery and for the murder of James Sloop during the robbery. One of the co-conspirators, Antonio Dorsey, had the charges against him nol pross'd. Another, Harold Givens, had the charges against him dismissed after a nonsuit when James Calvin Mitchell changed his testimony the first time.

The third, James Calvin Mitchell, the person who actually shot Sloop, was allowed to plead guilty to second degree murder. The fourth, Anthony Douglas Carey, whose conviction and death sentence for first degree murder was reversed on appeal by the North Carolina Supreme Court, ultimately had the charges against him dismissed. Only petitioner was tried twice for first degree murder, and only he remains on Death Row.

There is no logical explanation for these dispositions.

> "It is perfectly clear from the evidence that 'Peanut' Mitchell was guilty of murder in the first degree, although he was later permitted to plead guilty to second degree murder. State v. Fox, supra, holds in such a situation that all the conspirators are guilty of murder in the first degree."

State v. Albert Lewis Carey, Jr., 288 N.C. 254, 218 S.E.2d 387, 400 (1975). At the Anthony Carey trial, the State's evidence tended to show that Mitchell and Givens had entered the Exxon station while the other three co-conspirators had remained outside in the car, State v. Anthony Douglas Carey, 285 N.C. 497, 206 S.E.2d 213, 215 (1974), so the degree of participation in the actual shooting (legally irrelevant, of course, as a defense to a charge of first degree murder in the circumstances of this case) does not rationalize the different dispositions of these cases. The Supreme Court of North Carolina remarked

that "The . . . [petitioner] age twenty-three, used James Calvin 'Peanut' Mitchell, age fifteen, to accomplish the murder," State v. Albert Lewis Carey, Jr.,288 N.C.254, 218 S.E.2d 387, 404 (1975), but there is no evidence in the record that petitioner was in fact the leader of the conspiracy or was the eldest of the co-conspirators.[14/] Due to the uncontrolled exercise of prosecutorial discretion in charging, dismissing charges, and allowing a guilty plea to a lesser offense, petitioner has been arbitrarily selected from five equally guilty co-conspirators to suffer the extreme penalty. Indeed, of the five first degree murder indictments arising from the slaying of James Sloop, "there is no meaningful basis for distinguishing the . . . case[e] in which . . . [the death penalty] is imposed from the . . . cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972)(concurring opinion of Mr. Justice White).

14/ The North Carolina Supreme Court did recognize, however, that "[t]he theory of the State's case . . . was that . . . [petitioner], his younger brother (Anthony Douglas Carey), James Calvin Mitchell (known as 'Peanut'), Harold Givens and Antonio Dorsey together planned and conspired to rob with firearms the operators of an Exxon service station." State v. Albert Lewis Carey, Jr.,288 N.C.254, 218 S.E.2d 387, 390 (1975).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S LIMITATION OF PETITIONER'S CROSS-EXAMINATION OF THE STATE'S PRINCIPAL WITNESS VIOLATED PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM AND HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This case presents an important question concerning the limitations which may be imposed upon a criminal defendant's right to cross-examine the witnesses against him. As in Chambers v. Mississippi, 410 U.S. 284, 289 (1973), the petitioner "was thwarted in his attempt to present . . . [a] portion of his defense by the strict application of certain . . . [state] rules of evidence." The key State witness against petitioner was Charlotte police officer W. O. Holmberg, a polygraph operator, to whom petitioner allegedly gave a statement admitting complicity in the robbery of the Williams' Exxon Station. Over petitioner's objection, the State was able to inform the jury that Holmberg was assigned to the police polygraph unit, R.36, and that he took petitioner's statement in the polygraph room, R.38. Outside the presence of the jury, petitioner's counsel sought to insure that he could cross-examine Holmberg concerning the circumstances of his first meeting with petitioner on July 10, 1973, without allowing the State to elicit all the details concerning the events in the polygraph room on July 11, when the petitioner refused to take a scheduled polygraph test. Petitioner's counsel noted, R. 56, that the State had already been able to communicate to the jury that a polygraph test was somehow involved in the interrogation of petitioner, and he argued that he would not "open the door" for the State to introduce testimony con-

cerning the aborted July 11 test unless he "specifically asked him [Holmberg] about the test," ibid. The trial court ruled, however, that if petitioner's counsel asked any questions about the July 10 pre-test, "I'm going to let the State bring it all in." R. 56. 15/

15/ The entire colloquy between petitioner's counsel and the trial court concerning this issue is as follows:

> "MR. HASTY [petitioner's counsel]: All right. If it please the Court, so that I will understand, now am I to take it that you do not want me to ask Mr. Holmberg -
> COURT: I don't care what you ask Mr. Holmberg.
> MR. HASTY: I understand.
> COURT: But my point is, you were in chambers very emphatic that you didn't want this about the polygraph to come out. Now, if you're going to ask Mr. Holmberg what he told him the day before, I'm going to let him tell them everything he told him the day before because it's not fair to let you have your cake and eat it, too.
> MR. HASTY: Well, sir, I, of course, realize that I could open the door, as they say, but I don't believe I would do that unless I specifically asked him about any test.
> COURT: No, sir. When you start saying what he told him the day before, then the State is entitled to have the whole thing spread on it.
> MR. HASTY: Then I take it that you would rule the same way if I were to ask him if he told him that it would be to his benefit to take the examination.
> COURT: The polygraph test, and you would have opened it up.
> MR. HASTY: All right, sir.
> COURT: Now, you can't put in half about the polygraph test. If you don't want it before the jury, why that's a decision you will have to make.
> MR. HASTY: That's the exact argument I made to the Supreme Court, and that is, of course, what the Supreme Court is letting the State do, get in half of it, and I, of course, am saddled with that decision. I realize that. All right, sir.
> COURT: And you're asking him if he told him something about the polygraph test, and wanting the jury to infer he's telling him about this statement. Now, that I can't permit.

This ruling created an insoluble problem for petitioner. Although he sought to explore in the presence of the jury what Holmberg told him on July 1? at the pre-test session (e.g., whether Holmberg emphasized that taking the test was for the mutual benefit of the State and petitioner; whether petitioner understood that, while the results of a polygraph test were inadmissible, his statements made during the conference would be admissible; whether representations were made to petitioner concerning the use of polygraph results; and whether petitioner

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15/ cont'd.

> MR. HASTY: Well, yes, sir.
> COURT: He is going to have to explain what he said to him was about a polygraph test. Now, this is where we come to.
> MR. HASTY: Of course, the State is doing the exact opposite thing, letting the jury infer that this was a statement given without fear of a polygraph, which is, of course, not true. I will, of course, abide by your feelings.
> COURT: I am just telling you what is going to happen. If you don't, I'm going to let the State bring it all in.
> MR. HASTY: I just wanted to see where the perimeters were.
> COURT: All right, sir.
> MR. HASTY: Thank you."

R. 55-56.

The State elicited the testimony concerning Holmberg's duties in the police department in the following manner:

> "W. O. HOLMBERG testified as follows:
> I am W.O. Holmberg. I am employed by the City Police Department. I have been a police officer for twenty-three years.
> Q. [the District Attorney]. What unit of the police department are you assigned to?
> A. The polygraph.
> Q. I'll ask you if you have --
> MR. HASTY [petitioner's counsel]: If it please the Court, I would like to at this time address some remarks to the Court if I could.
> [The jury was excused. Petitioner moved for an instruction that the district attorney avoid eliciting any mention of the polygraph. The motion was denied. The jury was brought back in.]
> . . . .
> Q. [the district attorney]. Where did you first observe Albert Lewis Carey?
> A. In the polygraph room.
> MR. HASTY: Objection and move to strike.
> COURT: Motion denied."

R. 36-38.

understood that he did not have to take the polygraph test even after he signed an agreement to do so) and thereby establish a perspective upon his July 11 statement to Holmberg, doing so would allow the State to show that petitioner made his July 11 statement just before he was scheduled to take a polygraph test (and that petitioner refused to take the test). After the trial court's ruling, petitioner asked no questions of Holmberg about what transpired during his July 10 conversation with petitioner. R. 56.

Such an elicitation by the State would create a powerful -- although impermissible -- inference that petitioner gave an oral confession in order to avoid taking a lie detector test which would have established the falsity of an exculpatory statement. Although the results of a polygraph examination are not admissible in North Carolina, State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961), and although parties are not "permitted to introduce lie detector results into evidence by indirection," State v. Foye, supra, 120 S.E.2d at 172, allowing the State to show that petitioner had flinched from taking such an exam would permit the State to imply that such an exam, if given, would have inculpated petitioner. In other words, the State could have suggested to the jury the probable results of a polygraph test, even though such a test was never given. This was clearly an impossible tactical situation for petitioner. He was forced either to abandon his right to cross-examine Holmberg or his right to keep out the results of a polygraph test. He elected the former course. Although -- as the North Carolina

Supreme Court recognized, State v. Albert Lewis Carey, Jr., 288 N.C. 254, 218 S.E.2d 387, 399 (1975), -- the trial judge did not explicitly forbid petitioner to ask any particular questions, his ruling necessarily had the effect of preventing petitioner from making a comprehensive and searching cross-examination of Officer Holmberg.

The right to cross-examine prosecution witnesses is a fundamental part of the Sixth Amendment's guarantee that a criminal defendant will be "confronted with the witnesses against him." Pointer v. Texas, 380 U.S. 400, 405 (1965).

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right to confrontation, and helps assure the 'accuracy of the truth-determining process.' Dutton v. Evans, 400 U.S. 74 (1970); Bruton v. United States, 391 U.S. 123 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g. Mancusi v. Stubbs, 408 U.S. 204 (1972). But its denial or significant dimunition calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315 (1969)."

Chambers v. Mississippi, 410 U.S. 284, 297 (1973).

As the Court recognized in Chambers, the right of cross-examination is not "absolute" and may be limited if questions

are irrelevant,[16] repetitious,[17] or cumulative.[18] These limitations "cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." Gordon v. United States, 344 U.S. 414, 423(1953).

The Court should grant certiorari to determine whether it is permissible to limit the cross-examination of a critical State witness in a situation where no legitimate state interest is served by such a limitation. For under the law of North Carolina, see State v. Foye, supra, introduction of the results of a polygraph exam is clearly impermissible. Allowing "the State to bring it all in", R. 56, here would not serve any valid informational purpose, since the jury would not be permitted to make inferences from the results of such tests or from the implied results of such tests. The North Carolina Supreme Court has failed to consider the relationship between the state interest protected by its "opening the door" rule and the value to a criminal defendant of a full and searching examination of prosecution witnesses.

In another context, this Court has observed that it has

16/ See, e.g., Harris v. United States, 371 F.2d 365 (CA9 1967); United States v. Rich, 262 F.2d 415 (CA2 1959).

17/ See, e.g., United States v. Collier, 362 F.2d 135 (CA7 1966), cert. denied, 385 U.S. 977 (1966).

18/ See, e.g., Carl v. United States, 343 F.2d 573 (CA8 1965); United States v. German-American Vocational League, 153 F.2d 860 (CA3), cert. denied, 328 U.S. 833 (1946).

> "been particularly suspicious of state trial rules which provide non-reciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. See e.g. Washington v. Texas, 388 U.S. 14, 22 (1967); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1180-1192 (1960)."

Wardius v. Oregon, 412 U.S. 470, 474 n.6 (1973). The trial court's ruling gave the State a particularly unfair advantage because the district attorney had already established, over petitioner's objection, that Hohberg was a polygraph operator who interviewed petitioner in the polygraph room. The jurors could reasonably have concluded that petitioner's statement had been made during the course of a polygraph test and had been "scientifically" determined to be truthful.[19/]

The fact that a difficult choice confronts a criminal defendant at trial does not, of course, mean that the defendant's due process rights are violated.[20/] But the vital right to cross-

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19/ In the opinion of many commentators, the reliability of polygraph testing has not been satisfactorily established, however. See, e.g., Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 YALE L.J. 694, 695-727 (1961); Burkey, The Case the Polygraph, 51 A.B.A.J. 855, 857 (1965).

20/ Cf. Harris v. New York, 401 U.S. 222, 225 (1971)(the decision to testify); McGautha v. California, 402 U.S. 183, 213 (1971) (the decision to demand trial by jury); Brady v. United States, 397 U.S. 742, 755 (1970)(the decision to plead guilty). But see United States v. Jackson, 390 U.S. 570 (1968).

examination should not be limited, as here, where there is no legitimate state interest to be protected. Petitioner should have been allowed to "sift" Officer Holmberg concerning what transpired between petitioner and him on July 10. In this situation, a ruling that this kind of cross-examination of Holmberg would "open the door" to the introduction of the facts that petitioner had agreed to take a polygraph test, but had refused at the last moment and had given an oral confession instead, violated petitioner's Sixth Amendment right to confront the witnesses against him.[21] Had petitioner been able to examine Holmberg fully, he might have established that the July 11 statement was untrustworthy or unreliable because of petitioner's misconceptions (due to Holmberg's representations) concerning the nature of the interrogation.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of an opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

Alford v. United States, 282 U.S. 687, 692 (1931). Moreover,

21/ Cf. McGautha v. California, 402 U.S. 183, 213 (1971):

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."

the jury was instructed that (although the trial court had admitted petitioner's confession) it had the final responsibility of determining whether petitioner's statement was truthful and voluntary. The trial court charged that "if you find that the defendant made such admissions, then you should consider all the circumstances under which they were made in determining whether it was a truthful admission and the weight you will give to it." R. 112 (emphasis added). Because of the trial court's limitation of petitioner's cross-examination of Officer Holmberg, however, the jury simply did not have before it "all the circumstances" under which the confession was made.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S ORAL STATEMENT TO A POLICE POLYGRAPH OPERATOR, MADE DURING CUSTODIAL INTERROGATION, SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS INVOLUNTARILY GIVEN, HAVING BEEN OBTAINED THROUGH PSYCHOLOGICAL COERCION, IN VIOLATION OF PETITIONER'S RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's confession to Charlotte Police Department polygraph operator W.O. Holmberg was the only evidence introduced at his trial which linked him to the murder of James Sloop; it was error to have admitted into evidence this confession because it was involuntary and had been obtained by psychological coercion. This Court has repeatedly recognized that:

> "coercion can be mental as well as physical[;] . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'"

Blackburn v. Alabama, 361 U.S. 199, 206 (1960)(footnote omitted).

See also Chambers v. Florida, 309 U.S. 227, 237-238 (1940); Reck v. Pate, 367 U.S. 433, 440 (1961); Spano v. New York, 360 U.S. 433, 440 (1961). "The question in each case is whether a defendant's will was overbourne at the time he confessed." Reck v. Pate, supra, 367 U.S. at 440. "When a suspect speaks because he is overbourne, it is immaterial whether he has been subjected to a physical or mental ordeal." Watts v. Indiana, 338 U.S. 49, 53 (1949)(opinion of Justice Frankfurter for the Court). If a confession has been wrung from an accused by psychological duress, it cannot be deemed "the product of a rational intellect and a free will." Blackburn v. Alabama, supra, 361 U.S. at 208.

When a coerced confession claim is made, the Court must make its own examination of the record, Spano v. New York, supra, 360 U.S. at 316; Watts v. Indiana, supra, 338 U.S. at 51, and it must base its judgment upon a consideration of "[t]he totality of the circumstances," Fikes v. Alabama, 352 U.S. 191 197 (1957) under which the confession was taken. In the present case, petitioner's statement to Officer Holmberg was involuntary because it was made under the duress of a threatened polygraph examination at a time when petitioner did not understand the manner in which statements made to a polygraph examiner could be used against him.

Petitioner was arrested at his sister's home at approximately 1:00 a.m., July 10, 1973. R. 32. That afternoon, the police requested petitioner to take a polygraph examination for the "mutual benefit" of petitioner and the police. R. 44.

Petitioner signed a consent form to take the test.[22/] Petitioner was not told that he faced the death penalty if convicted of

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22/ The consent form which petitioner signed on July 10 was not made part of the narrated transcript. Because of the North Carolina practice of "narrating" the trial transcript on appeal (see Bumper v. North Carolina, 391 U.S. 543, 546 n.8 (1968)), it is somewhat difficult to ascertain what provisions were in this consent form. The following testimony of Officer Holmberg (apparently somewhat garbled in transcription) describes this form:

> "COURT: Did you advise him that the results are not admissible in evidence. Did he know that?
> A. [Officer Holmberg]: That's right.
>
> It is not the form that the results of my examination would not be admissible in evidence because this is a notable request for release form [sic]. It says I do specifically waive any and all rights of privacy and [sic] I have or may have with reference to taking the said polygraph test and making the known the examination's results [sic], information elicited from me and the examiner's opinion arising from said polygraph examination. I do hereby authorize the Charlotte Police Department officers and employees to discuss both orally and in writing the said examination results, information elicited from me and the examiner's opinions in the matter and may be made to all or any proper authorities [sic] for whatever use he or she may determine.
>
> Q. [Petitioner's counsel]: Would you read the first paragraph for the record, please, sir?
> A. I, Albert Carey, did voluntarily, without threats, promises of immunity or reward, and without duress, coercion, or force, agree to be examined on and with a polygraph (lie detector) the said examination to be given by an officer and/or employee of the Charlotte Police Department for the mutual benefit of myself and the Charlotte Police Department and the proper authorities concerning this matter. I did not advise Carey that the test and the conference with me would not be used in evidence against him. It's right there in the transcript.
>
> Also I did not tell him that the test and conference with me could be used as evidence against him."

R. 45-46. The meaning of the words "It's right there in the transcript" is obscure. Holmberg explicitly says that he did not tell petitioner that the "conference" could be used against him (although the record here also has Holmberg saying he did not advise petitioner that the conference would not be used against him, this appears to be a stenographic error; this contradicts Holmberg's final statement in the quoted excerpt and also his later testimony before the jury, R.52, that he did not tell petitioner that what he said during the conference could be used against him). If the word "transcript" here refers to the consent

first degree murder (in fact, he was told that he faced "imprisonment" if convicted of this charge, R.49; R. 136-137). Most importantly, he was told that the results of a polygraph test could not be used against him, but he was not at any time informed that what he said to the polygraph operator could be used against him. Finally, he was not informed that he could revoke his consent to take the polygraph test.

The test was begun at about 4:30 p.m. on July 10, but Officer Holmberg determined that petitioner was under the influence of drugs (according to Holmberg, petitioner had "smoked three joints of marijuana and had consumed approximately four ounces of AC; that's cough syrup" the previous night).[23/]

Approximately fifteen hours later, petitioner was taken from his cell, given his Miranda warnings by Detectives Whiteside and Starnes, and questioned for half an hour about the Williams' Exxon Station robbery. Petitioner denied any participation in the crime. Petitioner was not allowed to make any telephone calls, and the police did not ask him whether he wished to call anyone. R. 40. These two officers, who were admittedly attempting to get "results"(R. 58) from petitioner, then took petitioner to the polygraph unit. Officer Holmberg asked petitioner if he had received his Miranda warnings and petitioner replied that he had.

22/ cont'd.

form and if Holmberg testified that the consent form contained the assurance that what was said to the polygraph operator could not be used against petitioner, then petitioner was subjected to outright deceit. For it was, of course, clear to the police all along that what petitioner said to Holmberg (as opposed to the results of a polygraph test) was admissible against petitioner. If the consent form said otherwise, it was affirmatively misleading.

23/ R. 86. (of the "narrated" transcript prepared for petitioner's first appeal).

Holmberg did not advise petitioner of the uses of polygraph test results and of statements made during the course of a polygraph examination. Nor did he correct the misapprehensions that petitioner would have presumably been under concerning the different uses of test results and oral statements made to a polygraph operator. In fact, Holmberg did not check to see whether petitioner remembered anything from the day before (a time when, in Holmberg's own judgment, petitioner was substantially under the influence of drugs).

As Holmberg prepared to begin the test again, petitioner said that he did not want to take the test but that instead he wanted to "discuss", R. 41, something with Holmberg. At this time, petitioner made his alleged confession. It is clear that the only reason petitioner confessed was that he wished to avoid taking the polygraph test he had agreed to undergo for his "benefit" and that he did not realize that he had a right simply to refuse to take the test. Either petitioner did not understand (as a result of his drugged condition on July 10) that polygraph results were inadmissible or he believed that what he said in a "conference" with Holmberg would be inadmissible.[24/] In either event, petitioner was seriously mistaken, but the police had finally obtained their desired "results". This was clearly a case where "the unwary concede[d] that which only bewilderment or ignorance would justify." Tomkins v. Missouri, 323 U.S. 485, 489 (1945). When petitioner was finally permitted to see his wife and

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24/ And petitioner might have been concerned about the results of a polygraph test, for Holmberg regarded as "incriminating" and "evasive" the few answers of petitioner's that he had been able to analyze on the previous day, July 10. R. 95-96 (record on appeal of petitioner's first appeal).

family, he informed the police he had "nothing further to say." R. 57.[25] Counsel was appointed for petitioner six days later.[26]

Although the North Carolina Supreme Court held petitioner's confession admissible,[27] it was clearly the result of psychological

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25/ Although the record is not perfectly clear, petitioner may also not have realized that an oral "statement" was just as admissible against him as a written one. Officer Whiteside testified that after petitioner had made his statement to Holmberg and after he had made check marks on a list of robberies, Whiteside took him to the second floor of the police station and asked him to make a "statement:

> A. [Officer Whiteside] . . . he [petitioner] did not make any statement.
> Q. [petitioner's counsel] Now, by statement, you mean something in writing?
> A. That is correct, a written statement."

R. 60.

26/ The record on appeal at petitioner's first trial indicates that counsel was appointed for him on July 17, 1973. R. 1.

27/ The Court affirmed the following findings of fact and conclusions of law of the trial court:

> "(1) On July 11, 1973, the defendant then being under arrest and advised by Officer H.J. Whiteside of the Miranda decision and his right to counsel, and he freely and voluntarily and with full understanding of his rights executed a written waiver of his rights to remain silent and to have an attorney present.
>
> (2) Immediately thereafter, defendant stated to Officer Whiteside and Starnes that he had no knowledge of the attempted armed robbery and shooting at the Williams' Exxon Service Station.
>
> (3) On the previous day the defendant had voluntarily agreed to take a polygraph test, and for that purpose saw Officer Holmberg, the polygraph operator at the Charlotte Police Department. Officer Holmberg did not complete the test because of the condition of the defendant at that time which, in the opinion of Officer Holmberg, made it impossible to give an accurate test, and no results from that test were sufficient for Officer Holmberg to come to any decision concerning the accuracy of a polygraph test.
>
> (4) On July 11, 1973, the defendant was again brought to the polygraph room by Officers Whiteside and Starnes, who observed and heard what occurred during the period the defendant was in the polygraph room through an audio system and a mirror device permitting them to see into the room without being seen.

coercion through use of the polygraph. See State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 72, 102-103 (1975). The police "were concerned primarily with securing a ..tatement from defendant on which

27/ cont'd.

(5) Officer Holmberg asked the defendant when he had been brought into the room if he had been advised of his rights, and he stated that he had. Officer Holmberg then requested that he sign a consent to take the polygraph test, but the defendant advised him that he was not going to take the test but that he had something he wanted to discuss with Officer Holmberg. He thereupon, without any questioning on the part of Officer Holmberg, stated that the night before the incident happened at the Exxon station, he, Givens, and Mitchell had planned the robbery for the next day. That he took these persons to Trade and Clarkson Street in his automobile and let them out, and that he then went to a dry cleaner's and a pool hall, and later heard that Sloop had been shot.

(6) Officers Whiteside and Starnes then went into the polygraph room and presented to the defendant a handwritten list of alleged armed robberies occurring in Charlotte with the date of each and the type of weapon alleged to be used. Among them appeared "10. Sloop (Exxon Sta.) Trade and Cedar, 19 June, shotgun," indicated by ditto marks. The defendant was requested to mark with a check mark and initial any of the incidents written on the sheet for which he had been "wheel man." Among those checked and initialed by him was that referring to Sloop set forth above.

(7) The defendant at the time was twenty-three years of age and had attained the eleventh grade in school. There is no evidence that he was in any way coerced or threatened or that any promises were made to him on leniency, and he fully and intelligently understood his rights and voluntarily and intelligently waived them.

(8) The statement to Officer Holmberg was not made in response to any interrogation but was volunteered by the defendant.

(9) The list checked by the defendant was made in response to police interrogation but only after the defendant had been fully advised of his rights by the officers who presented him with the list and after he had intelligently and voluntarily waived his rights and the right to have an attorney present.

Based upon the foregoing, the Court concludes as a matter of law, (1) That the statement volunteered to Officer Holmberg is admissible in

they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with most careful scrutiny." Spano v. New York, supra, 360 U.S. at 324. When such scrutiny is applied to the circumstances under which petitioner's confession was obtained, it is clear that petitioner confessed only through a misunderstanding of how statements made to a polygraph operator could be used against him. This misunderstanding was due to the intentional duplicity of the interrogating officers. "A confession by which life becomes forfeit must be the expression of free choice . . . . [I]f it is the product of sustained pressure by the police it does not issue from a free choice." Watts v. Indiana, supra, 338 U.S. at 53.

27/ cont'd.

> evidence; (2) That the check mark and initials beside the name of Sloop on the list may be received in evidence but that all other parts of the document containing this notation shall be eliminated from the exhibit, no, [sic] shall be eliminated from the State's Exhibit #8 for voir dire so that the jury will see only that portion relating to the Sloop Exxon station matter."

R. 46-49.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

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Appendix A:

State v. Albert Lewis Carey, Jr., 288 N.C. 254m 218 S.E. 2d (1975).

execution, as they were bound to take notice of these things, and their mortgages were taken subject to any rights of lien which had accrued or attached in favor of mechanics or material men. Their rights were acquired long prior to the time the statement was filed in which appeared the erroneous date, and such statement was not notice to them, nor could or were their liens or rights in any way affected by it; and the evidence of the true date was competent, and its reception in no manner or extent harmful or prejudicial to the parties holding the mortgages." 43 Neb. at 896–897, 62 N.W. at 322.

Although the Nebraska statute did not require the dates of performance to be stated in the claim of lien it did provide that the lien was effective as of the date of first furnishing. Consequently the court's reasoning with regard to the effect of an erroneously stated date of first furnishing on a mortgagee taking before the filing of the claim of lien applies to this aspect of the instant case.

It was, consequently, error for the Wake County District Court to dismiss with prejudice plaintiff's claim for relief against the Kortes and to discharge the claim of lien. The decision of the Court of Appeals affirming this order is, therefore, reversed and this case is remanded to that Court with instructions to remand it to the District Court of Wake County for further proceedings in accordance with this opinion.

Reversed and remanded.

STATE of North Carolina
v.
Albert Lewis CAREY, Jr.

No. 82.

Supreme Court of North Carolina.

Oct. 7, 1975.

Following remand, 285 N.C. 509, 206 S.E.2d 222, defendant was convicted before the Superior Court, Mecklenburg County, Frank W. Snepp, Jr., J., of murder in first degree and felonious conspiracy, and he appealed. The Supreme Court, Copeland, J., held that even if evidence of other crimes were incorrectly admitted, its admission was rendered harmless by its prior admission without objection; that defendant had not been deprived of his absolute right of cross-examination; that it was proper for court to submit case to jury as to defendant's guilt of separate offenses of conspiracy to rob and murder in first degree; that district attorney could properly ask defendant's wife, who had been examined as a witness for defendant, about her prior inconsistent statements as they related to her previous relationship with another, who had also been charged with offense, for purposes of impeachment; and that death sentence was properly imposed on conviction of first-degree murder.

No error.

Lake, J., concurred in result.

Sharp, C. J., dissented and filed an opinion in which Branch, J., concurred.

1. Criminal Law ⇐452(1)

Record established that witness, through study and experience, had acquired requisite skill to give his opinion as to size of lead pellets taken from decedent's body, and, in murder prosecution, witness was not precluded from giving such opinion by reason of fact that he had been tendered as an expert in field of firearms identification.

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2. Criminal Law ⇐1169.9

Even if admission of claimed expert testimony as to size of lead pellets taken from decedent's body were error, in murder prosecution, it was harmless error, where witness testified on cross-examination that he had not compared any of shot contained in box of shotgun shells seized at defendant's residence with shot taken from decedent's body.

3. Criminal Law ⇐1169.1(7)

In murder prosecution, evidence which may have indicated that defendant had taken polygraph test was not prejudicial error, where jury never heard any testimony as to results of polygraph test.

4. Criminal Law ⇐414

Evidence established that defendant had freely, understandingly, voluntarily and intelligently made a statement and admission to officer, without undue influence, coercion or duress, and without any promise, threat, reward, or hope of reward and that defendant had been fully advised of his constitutional rights and had knowingly and intelligently waived his right to presence of counsel at time he made inculpatory statement and admission.

5. Criminal Law ⇐369.1, 372(1)

General rule is that in prosecution for particular crime, evidence of other offenses is inadmissible on issue of guilt if its only relevancy is to show character of accused or his disposition to commit an offense of nature of one charged; but, if evidence of other offenses tends to prove any other relevant fact, it will not be excluded merely because it also shows the defendant to have been guilty of an independent crime.

6. Criminal Law ⇐698(3)

When incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.

7. Criminal Law ⇐1169.11

Even if evidence of other crimes were incorrectly admitted, its admission was rendered harmless by its prior admission without objection.

8. Witnesses ⇐266

Defendant had not been deprived of his absolute right of cross-examination on theory that in order for him to effectively cross-examine police officer as to circumstances surrounding defendant's alleged confession it was necessary to elicit testimony pertaining to polygraph test which is not permitted, where evidence defendant referred to was not result of any polygraph test and was not elicited during course of a polygraph examination and trial court, in answer to question by defense as to scope of permissible cross-examination, stated that he did not care what defendant's counsel asked police officer.

9. Homicide ⇐18(1)

When a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree. G.S. §§ 7A-27(a), 7A-31(a), 14-17, 14-87, 15-144.

10. Criminal Law ⇐752½

Where defendant was originally charged with conspiracy to commit armed robbery, armed robbery, and felony murder, and all three charges were consolidated at trial, trial court properly refused to submit charge of armed robbery to jury as a separate offense but a judgment of nonsuit should not have been entered as to charge of armed robbery. G.S. §§ 7A-27(a), 7A-31(a), 14-17, 14-87, 15-144.

11. Criminal Law ⇐30

Where State prosecutes a defendant for first-degree murder on theory that homicide was committed in perpetration or attempt to perpetrate a felony under provisions of statute, under better practice, solicitor should not secure a separate indictment for the felony. G.S. § 14-17.

12. Criminal Law ⇐30

Conspiracy to rob did not merge into offense of first-degree murder, and defendant could properly be sentenced for both offenses. G.S. §§ 7A-27(a), 7A-31(a), 8-57, 14-87, 15-144.

13. Criminal Law ⇐30

It was proper for court to submit case to jury as to defendant's guilt of separate offenses of conspiracy to rob and murder in first degree. G.S. §§ 7A-27(a), 7A-31(a), 8-57, 14-87, 15-144.

14. Witnesses ⇐268(1)

Defendant's wife who had been examined as a witness for defendant was subject to cross-examination to same extent as if unrelated to him. G.S. § 8-57.

15. Witnesses ⇐379(2)

In murder prosecution, district attorney could properly ask defendant's wife, who had been examined as a witness for defendant, about her prior inconsistent statements as they related to her previous relationship with another, who had also been charged with offense, for purposes of impeachment. G.S. § 8-57.

16. Criminal Law ⇐372(1)

Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

17. Criminal Law ⇐720(9)

Statement made by district attorney in his argument to jury pertaining to alleged confession of defendant constituted only a reasonable comment on evidence and thus did not deny defendant a fair and impartial trial.

18. Criminal Law ⇐720(7)

In murder prosecution, jury argument which in effect told jury that trigger man was certain person who was 15 years old at time as compared to defendant who was 23 years old was legitimate comment by solicitor, under evidence presented in case.

19. Homicide ⇐354

Death sentence was properly imposed upon conviction of first-degree murder. G.S. §§ 7A-27(a), 7A-31(a), 14-87, 15-144.

Defendant was convicted of two charges upon two separate bills of indictment which were consolidated for trial. In one indictment, drawn under G.S. 15-144, defendant was charged with the murder of James D. Sloop, Sr. on 19 June 1973. Upon this charge the jury returned a verdict of "Guilty of Murder in the first degree." From the mandatory sentence of death imposed upon the verdict defendant appealed directly to this Court pursuant to G.S. 7A-27(a). In the second indictment it was charged that on 19 June 1973 defendant feloniously conspired with James Calvin Mitchell, Anthony Carey and others to attempt to commit the crime of armed robbery (G.S. 14-87) by attempting to steal, take and carry away money from the person of James Sloop by the use of a shotgun whereby Sloop's life was endangered and threatened. Upon this charge the jury returned a verdict of "guilty of felonious conspiracy." The judge imposed a sentence of ten years, and defendant appealed to the Court of Appeals. Upon defendant's motion this conviction was certified for initial appellate review by the Supreme Court pursuant to G.S. 7A-31(a).

Defendant was convicted of these same charges at his first trial before Judge Sam J. Ervin III at the 26 November 1973 Session of Mecklenburg County Superior Court. On appeal from these first convictions, this Court, in an opinion by Justice Lake, awarded defendant a new trial for failure of the trial judge to permit defendant to interrogate prospective jurors concerning their views with reference to the imposition of the death penalty and for failure to permit defendant to inform the

jury, during final arguments, that under the law of this State, the prescribed punishment for first-degree murder is death. *See State v. Carey*, 285 N.C. 509, 206 S.E.2d 222 (1974).

The theory of the State's case (at both trials) was that defendant (known as "Butch"), his younger brother (Anthony Douglas Carey), James Calvin Mitchell (known as "Peanut"), Harold Givens and Antonio Dorsey together planned and conspired to rob with firearms the operators of an Exxon service station located at the intersection of West Trade and Cedar Streets in Charlotte, North Carolina. During the course of the attempted armed robbery on 19 June 1973 James D. Sloop, Sr., who was assisting Mr. Freeman B. Williams (owner) in the operation of the station, was shot in the abdomen with a sawed-off shotgun. Mr. Sloop died on 3 July 1973 from an infection of his digestive organs, which was caused by the wound inflicted on 19 June. James Calvin "Peanut" Mitchell (hereinafter, sometimes referred to as Mitchell) fired the fatal shot. After the shotgun was discharged, Mitchell fled the scene without getting any money or anything else.

All five of the aforementioned individuals were originally charged with conspiracy to commit this offense. Mitchell, who was fifteen-years-old at the time of the incident, was allowed to plead guilty to second-degree murder in exchange for his testimony against his alleged co-conspirators.

Defendant's brother, Anthony Douglas Carey, was the first of these co-defendants to go to trial. He was convicted of conspiracy to commit armed robbery and of first-degree murder before Judge Sam J. Ervin III at the 29 October 1973 Regular "A" Session of Mecklenburg County Superior Court. Mitchell testified for the State at this trial and his testimony was to the effect that he, defendant, defendant's brother, Harold Givens and Antonio Dorsey planned to rob the Exxon service station located on West Trade and Cedar Streets; that defendant supplied him with a sawed-off shotgun and transported him to the vicinity of the station in his automobile; that he and Givens went to the service station with the intent to rob it; that he shot James D. Sloop, Sr., with the sawed-off shotgun; and that he and Givens then ran back to the automobile driven by defendant and were transported away from the scene. On appeal from these convictions, this Court, in an opinion by Justice Huskins, granted defendant's brother a new trial. *See* 285 N.C. 497, 206 S.E.2d 213 (1974).

The next co-defendant to come to trial was Harold N. Givens. At this trial Mitchell again testified for the State. However, this time Mitchell's testimony was to the effect that he had taken no part in the armed robbery and that he was at home at the time it occurred. At the close of the State's evidence, defendant Givens' motion for judgment as in the case of nonsuit was granted.

Defendant was the third of these co-defendants to come to trial (first trial before Ervin, J.). Mitchell once again testified for the State. This time Mitchell testified that he, defendant, defendant's brother and Antonio Dorsey planned the service station robbery prior to the date it was attempted; that he was in the company of defendant and defendant's brother on the 18th of June from late morning until approximately 6:00 p. m.; that he met defendant and defendant's brother between 4:00 and 5:00 p. m. on 19 June 1973 and rode around with them for about two hours, passing the Exxon station five or six times; and that he had originally been charged with first-degree murder, but had pled guilty to second-degree murder and had not been sentenced. *State v. Carey, supra.*

Subsequent to the above proceedings, the State elected to drop the charges against defendant's brother and against the co-defendant Dorsey. As previously noted, co-defendant Givens had the charges against him nonsuited.

At defendant's second trial before Judge Snepp, the State's evidence, summarized ex-

cept where quoted, tended to show the following:

Freeman B. Williams testified that on 19 June 1973 he was the owner and the operator of the Exxon service station at the corner of West Trade and Cedar Streets, Charlotte, North Carolina. Williams further testified that on the evening of 19 June, at approximately 7:00 p. m., he and his employee, James D. Sloop, Sr., were in the process of closing the station when two boys came around the Cedar Street side of the station. One of the boys was carrying a sawed-off shotgun. One of the boys, he did not know which one, said "Gimmee," and Mr. Sloop spoke up and said, "Oh boy, I wouldn't give you anything." When Mr. Sloop made the above statement, the boy with the shotgun "just whirled around like that and shot him . . . right in the stomach. His intestines just dropped down, and, of course, they ran, the two boys. They ran back around the way they came . . . behind the station on the Cedar Street side." Williams positively identified Mitchell, who was present in the courtroom, as the boy who fired the fatal shot. Williams further testified that defendant was not the "other boy" with Mitchell.

Patrol Officer B. B. Davis testified that on 19 June 1973 he was operating a mobile unit in uptown Charlotte when he received a call at approximately 7:00 p. m. and proceeded to Williams' Exxon station. When he arrived, he jumped out of the squad car and ran inside the office portion of the station. Mr. Sloop was standing inside the office, about three feet from the door. "He was standing there with his hands clasped together under his stomach and his stomach was slit open and his intestines were hanging out in his hands." Patrolman Davis told Sloop to sit down, that an ambulance was en route. Sloop responded: "It's too late, I'm dying."

James Calvin "Peanut" Mitchell was called by the State and he testified that he was seventeen-years-old and was then incarcerated in the Mecklenburg County jail. He stated that he was serving a forty year sentence "for murder and armed robbery" (he had apparently been sentenced sometime subsequent to defendant's first trial).

As to the events of 19 June 1973, Mitchell testified as follows:

"On June 19, 1973, I was fifteen years old, I don't remember what time it was, but remember going to the Exxon Station at West Trade Street here in Charlotte. When I got there, I went up there and told the man to freeze and give me all he had. Then he went for a gun and I shot him. After I shot him I went across the fence and ran. I ran down by Irwin Avenue and on across Seaboard Street through the Fairview Homes. From Irwin Avenue up the path there to Seaboard Street and then on to Fairview Homes.

"After then, I messed around up there on Oaklawn Playground and then went home.

"Q. Was anybody with you at the time?

"A. Nope.

"Q. How did you get to the Exxon Service Station?

"A. How did I get to the Exxon Service Station?

"Q. Yes.

"A. I walked.

"Q. Did anybody go with you?

"A. No, didn't nobody go with me. It was a guy who was down at Irwin Avenue, playing basketball. So I told him to go to the service station with me to get a drink. He went up there. So when I pulled the gun on the man, he throwed the drink down and ran."

At this point, the State moved the court to declare the witness Mitchell "hostile." The trial judge excused the jury and conducted a *voir dire* hearing, and after finding facts and concluding that Mitchell was in fact hostile, permitted the State to ask him leading questions during the remainder of the direct examination. After reading a

portion of his testimony at defendant's first trial, Mitchell admitted the authenticity of the questions and answers then propounded and given, but denied the truthfulness of all of his responses.

Lieutenant Detective Wade Stroud testified that in July of 1973 he was commander of the "Task Force," a uniformed division of the Charlotte Police Department normally given special assignments. He stated that at approximately 1:00 a. m. on 10 July 1973 he went to 305 Oregon Street, Charlotte, North Carolina, in order to serve arrest warrants on defendant and defendant's brother. He found both of these individuals asleep in an upstairs bedroom. After defendant and his brother had been placed under arrest, Stroud walked back downstairs looking for another person that he had a warrant for. As he entered the kitchen area, he observed, to the left of the stove, a partially opened drawer that contained a box of approximately thirteen .20 gauge 3-inch magnum shotgun shells. Stroud seized the box. The box and the shells were introduced into evidence by the State.

B. J. Sloan, a firearms examiner in the Crime Laboratory of the Charlotte Police Department, testified that his duties included the examination of weapons to determine if they were in good mechanical condition; the examination of bullets and cartridge cases to determine if they came from a particular weapon; the examination of ammunition to determine the caliber; the examination of weapons to determine the caliber and gauge; and the examination of shotgun shells and shotgun shell components to determine size and make.

Over defendant's objection, the State tendered the witness Sloan as an expert, qualified to testify in the field of firearms identification. After defendant's objection was overruled, Sloan testified that based on his examination of the four lead shot pellets removed from the body of James D. Sloop, Sr., during an autopsy, he had concluded * * * they were No. 6 buckshot.

On cross-examination, Sloan testified that he had not examined any of the shot contained in the box of shotgun shells seized by Detective Stroud at defendant's apartment and therefore did not know if this shot was No. 6 or not.

W. O. Holmberg took the stand and testified that he was assigned to the polygraph unit of the Charlotte Police Department. At this point, defendant's counsel asked the court to excuse the jury so he could "address some remarks to the court." After the jurors left the courtroom, defendant's counsel told the court that the district attorney had been requested at the pre-trial conference not to bring out any evidence "concerning the polygraph examination." The court stated this fact was irrelevant and thereafter denied defendant's motion to strike the answer.

Thereafter, Officer Holmberg testified that on the morning of 11 July 1973 he had occasion to see defendant in the polygraph room, located on the fourth floor of the Law Enforcement Center. Before Holmberg could testify as to an incriminating statement and admission made by defendant at that time, defendant's counsel objected and moved to suppress such evidence. The trial judge conducted a *voir dire* hearing, and after finding the facts, concluded that the evidence was admissible. The exact nature of this evidence and its admission into evidence will be more fully considered in the opinion.

Following the *voir dire* hearing, Detective R. J. Whiteside testified that on 11 July 1973 he checked defendant out of the Mecklenburg County jail and escorted him back to the Law Enforcement Center. Detective W. D. Starnes was with Whiteside at this time. After they had entered a conference room in the Criminal Investigation Bureau, defendant was given the Miranda warnings and a standard waiver of rights form. It was read to him and he signed it. Defendant told the detectives that he understood his rights. Thereafter, defendant was questioned with regard to the Sloop shoot-

ing at the Exxon station. Defendant denied any knowledge of the incident. Defendant was thereafter taken to the fourth floor and turned over to Officer Holmberg. Detectives Whiteside and Starnes then entered an "observation room" adjacent to Holmberg's office where they could see defendant and Holmberg through a two-way mirror and could hear what they said through a PA system setup.

At this point, W. O. Holmberg was recalled and testified that after defendant was brought into his office (the polygraph room) at approximately 9:00 a. m. on 11 July 1973 he stated that he, Givens and Mitchell had planned the robbery of Williams' Exxon on the night prior to the incident; that on the date of the incident he had his wife's automobile; that he had driven Givens and Mitchell to the intersection of Trade and Clarkson Streets and had there let both of them out of the car with the understanding that they were going to rob Williams' Exxon service station.

After defendant had made the above recited statement, Holmberg testified that he left the polygraph room and asked Detectives Whiteside and Starnes for a list of alleged armed robberies that had been committed in the Charlotte area. Holmberg stated that he took this list with him back into his office (polygraph room) and placed it in front of defendant. He then asked defendant to put a check mark, along with his initials, beside any of the robberies that he had been involved in. Holmberg stated that defendant looked at the list and made "several check marks and initials behind each check mark." At this point, the State introduced an exhibit showing only defendant's marks beside the robbery at Williams' Exxon on 19 June 1973. More detailed examination of the events surrounding this incident will be considered in the opinion.

Detective R. J. Whiteside was recalled and testified that he had been in a position to hear and to see the conversation that Officer Holmberg had just testified to. Whiteside testified that defendant told Holmberg "that he was involved in this matter to the extent of taking these persons to the Exxon Station in his automobile and letting them out, and knew that they were going to rob Sloop."

At this time, the State rested its case.

Defendant's evidence, summarized except where quoted, tended to show the following:

Defendant took the stand and testified that he did not know James Calvin "Peanut" Mitchell prior to being arrested on these charges. Defendant further testified that:

"I did not take part in or help plan any robbery of the Exxon Station. I did not take Mitchell and somebody named Givens to the corner of Clarkson Street or Cedar and Trade. I did not kill James Sloop and I did not help plan the robbery at all. The shotgun shells that Officer Stroud says he found are not mine. I did not buy them and I did not know anything about them being in that house at all."

At the time of the incident, defendant stated that he was at his father-in-law's residence, which was located approximately one block from the Exxon station. Defendant's contentions regarding the alleged statement and checking on the list of robberies will be considered in the opinion.

On cross-examination defendant reasserted that he did not know a James Calvin "Peanut" Mitchell at any time prior to 19 June 1973, the date of the robbery. He denied ever going over to Mitchell's house and picking him up at any time for the purpose of committing robberies or for any other purpose.

Pamela Carey, defendant's wife, testified and more or less corroborated defendant's contentions regarding his defense of alibi.

On cross-examination, Pamela testified that the first time she met "Peanut" Mitchell was when she and her mother went to the Mecklenburg County jail on 10 July 1973. She stated that she had never met

Mitchell before that time. At this point, the district attorney commenced to "sift" the witness concerning two prior inconsistent statements she had given Detective H. R. Thompson on 10 July 1973. Both statements indicated that Pamela had known Mitchell prior to 19 June 1973 and that Mitchell and her husband had committed several armed robberies in the Charlotte area. Pamela read these documents and admitted that she had "signed" them both, but denied having made any of the statements contained therein. After further cross-examination, defendant's attorney objected to this particular line of questioning. At this point, the trial judge excused the jury and heard arguments by counsel, after which he indicated that he would let the State introduce into evidence Pamela's two inconsistent prior statements on the theory that whether or not she knew Mitchell was not a collateral matter (see Detective Thompson's testimony below). The contents of both statements and their admission into evidence will be more fully considered in the opinion.

At this point, with the State's consent, the testimony of Charles Glenn, given at defendant's first trial, was read to the jury. Glenn, who was defendant's father-in-law, testified that he and defendant were drinking beer and playing cards at his home at the time of the robbery.

Defendant then rested his case.

As rebuttal evidence, the State first called Eleanor C. Mitchell, who was James Calvin "Peanut" Mitchell's mother. She testified that she knew defendant during June of 1973; that she had seen him at her home; that he and his wife and a "couple of other fellows" would come by her house and pick up her son from time to time; and that prior to 9 July 1973 defendant had come by her home approximately twelve times.

The State also called Detective H. R. Thompson as a rebuttal witness. Thompson testified that during June and July of 1973 he had participated in the investigation of the Williams' Exxon station robbery and that as part of that investigation he had an opportunity to meet one Pamela Carey. Thompson further testified, over objection, that on 10 July 1973, after informing Pamela of her Miranda rights and having her execute the standard waiver form, she made two statements regarding various armed robberies that her husband and Mitchell had participated in. After Thompson identified State's Exhibits 11, 12 and 13 as the waiver form and statements, these documents were introduced into evidence and submitted to the jury for their examination.

Other pertinent facts and evidence will be discussed in the opinion.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. John R. B. Matthis, Raleigh, for the State.

John H. Hasty, Charlotte, for defendant appellant.

COPELAND, Justice:

[1] Defendant first assigns error to the action of the trial court in ruling that the State's witness, B. J. Sloan, was an expert in the field of firearms identification, and in permitting the witness to testify that based on his examination of the four lead pellets removed from the body of James D. Sloop, Sr., he concluded that they were No. 6 buckshot. Defendant argues that since the witness was tendered as an expert in the field of "firearms identification," he was not qualified to testify in the field of ballistics. This assignment is without merit.

The qualification of an expert is ordinarily addressed to the sound discretion of the trial court and "[t]he court's findings that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies." *See generally* 1 Stansbury, N.C. Evidence § 133 (Brandis Rev.

1973); 2 Strong, N.C. Index 2d, Criminal Law § 51 (1967). The evidence in the instant case clearly indicates that the witness Sloan, through both study and experience, had acquired the requisite skill to give his opinion as to the size of the lead pellets taken from the decedent's body. In *State v. Jenerett*, 281 N.C. 81, 90, 187 S.E.2d 735, 741 (1972), the defendant contended that the trial court erred in allowing a police officer, over the defendant's objection, to give an opinion as to the caliber of the bullet taken from the body of the deceased. In rejecting this contention, this Court, in an opinion by Justice Moore, stated:

"While the trial court did not expressly find the witness to be an expert in ballistics, the court did allow him to give his opinion as to the caliber of the bullet. By admitting the testimony as to the caliber of the bullet, the court presumably found him to be an expert. There was ample evidence to support such finding. [Citations omitted.]"

[2] Even assuming, *arguendo*, that the admission of this testimony was error, it was clearly harmless since the witness Sloan testified on cross-examination that he had not compared any of the shot contained in the box of shotgun shells seized at defendant's residence with the shot taken from the decedent's body. This assignment is therefore overruled.

[3] Defendant next assigns as error the overruling of his objection to the admission into evidence of his alleged statement given to Officer Holmberg and overheard by Officer Whiteside. The evidence indicated that Officer Starnes was in a position where he may have heard the statement, but he did not testify. Defendant also contends that the trial court committed prejudicial error by allowing the State to elicit on direct examination of Officer Holmberg the fact that he was assigned to the polygraph unit. Defendant has grouped these two arguments together. We will do likewise.

When Officer Holmberg initially took the stand he testified that he had been employed by the Charlotte Police Department for twenty-three years and that he was presently assigned to the polygraph unit. At this point, defendant's counsel asked the court to excuse the jury and thereafter told the court that the solicitor had been requested at the pretrial conference not to bring out any evidence "concerning the polygraph examination." The court stated it was irrelevant and overruled defendant's objection and denied his motion to strike.

Defendant relies on *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961), where this Court, in an opinion by Chief Justice Winborne, held that the *results* of a polygraph test are not admissible to establish the guilt or the innocence of one accused of a crime. The Court went on to state that: "Moreover, the parties should not be permitted to introduce lie detector results into evidence by indirection. [Citations omitted.]" *Id.* at 709, 120 S.E.2d at 172. Defendant's reliance on *Foye* is misplaced. In *State v. Williams*, 279 N.C. 515, 184 S.E.2d 282 (171), this Court, in an opinion by Justice Lake, held that, under the circumstances there presented, there was no prejudicial error from testimony that the defendant had agreed to take and took a polygraph test, since "[t]here was no evidence, before the jury, as to the nature of the test, the questions propounded, the answers given, or the result of the test." *Id.* at 524, 184 S.E.2d at 288. In the instant case, as in *Williams*, the jury never heard any testimony as to the results of a polygraph test. In fact, defendant was not administered a complete polygraph examination and there were no results for the jurors to hear. This portion of the assignment is therefore overruled.

[4] It is also defendant's contention that any alleged statement given by defendant to Officer Holmberg should be inadmissible because (i) the statement was not freely and voluntarily given; and (ii) the statement was induced by misrepresentations concerning the ultimate use of the polygraph examination. Defendant brought forward a similar objection to the introduc-

tion of this statement on the prior appeal. *See* 285 N.C. 509, 206 S.E.2d 222 (1974). In that case, this Court, after carefully reviewing all the evidence presented on *voir dire*, as well as the Court's findings of fact and conclusions of law, found no error in the ruling permitting the police officers to testify as to the statement made to them by defendant. *Id.* at 516-17, 206 S.E.2d at 227. The evidence at the second trial on this subject is substantially the same as that produced at the first.

In his brief, defendant concedes that the prior appeal constitutes the "law of the case" as to this issue but specifically asks that we reconsider the question in the light of *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975). In *Pruitt*, this Court, in an opinion by Justice Branch, held that the defendant's confession was not properly admissible in evidence since it was obtained "by the influence of hope or fear implanted in defendant's mind by the acts and statements of the police officers during defendant's custodial interrogation." *Id.* at 455, 212 S.E.2d at 100. The *Pruitt* decision was not grounded on the failure of the police to comply with the procedural safeguards enunciated by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), but on the fact that the confession was not "voluntarily and understandingly made." *Id.*, 286 N.C. at 454, 212 S.E.2d at 100. This has been the ultimate test as to the admissibility of confessions in this State since *State v. Roberts*, 12 N.C. 259 (1827).

Defendant contends that both *Pruitt* and *Roberts* render his confession inadmissible. In support of this contention, defendant asserts that he was misinformed as to the severity of the punishment for the charges against him (i. e., imprisonment as opposed to death); that he was told that the polygraph examination would be for his own benefit and for the benefit of the Charlotte Police Department; and that nothing elicited during the polygraph examination would be used in evidence against him.

Under the facts disclosed in this record, we find no merit in defendant's contentions. Defendant does not contend that he made the alleged statement to Officer Holmberg because the police were using the threat of a polygraph examination as a tool to force incriminatory admissions from him. Furthermore, defendant does not assert that he made the statement based on any improper inducement generating a hope that by doing so he might obtain relief from the criminal charges to which the confession related. *See State v. Pruitt, supra*, 286 N.C. at 458, 212 S.E.2d at 102-103. *See also, State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975). On the contrary, defendant affirmatively testified on direct examination that he did not make *any* incriminatory statement of any nature to Officer Holmberg or to any other officer on 11 July 1973, or at any other time. Under these facts, we cannot say that the statement and admission obtained from defendant were made under the influence of fear or hope, or both, growing out of language or acts of those who held him in custody. The admissibility of this evidence was for the trial judge. Based on the evidenced produced on *voir dire*, the trial judge found facts and made conclusions of law to the effect that defendant freely and voluntarily made the statement and admission as the State contended. There was ample evidence to support the trial judge's findings, and those findings in turn support the trial judge's conclusions that defendant freely, understandingly, voluntarily, and intelligently made a statement and admission to Officer Holmberg on 11 July 1973, without undue influence, coercion or duress, and without any promise, threat, reward, or hope of reward; that he had been fully advised of his constitutional rights and understood those rights; and that after being advised on these rights, he knowingly and intelligently waived his right to the presence of counsel at the time he made the inculpatory statement and admission. *See State v. Thompson, supra*, 287 N.C. at 318, 214 S.E.2d at 755. *See also State v. Young*, 287 N.C. 377, 214 S.E.2d 763

(1975); *State v. Simmons*, 286 N.C. 681, 213 S.E.2d 280 (1975); *State v. Pruitt, supra*; *State v. Thompson*, 285 N.C. 181, 203 S.E.2d 781, *cert. denied*, 419 U.S. 867, 95 S.Ct. 123, 42 L.Ed.2d 104 (1974). Thus, we adhere to our former opinion holding this evidence admissible. This assignment is overruled.

Defendant next contends that the trial court committed prejudicial error in allowing the State to introduce into evidence Exhibit 8-A, which was an excerpt from a list of armed robberies that included the attempted robbery of Williams' Exxon service station at Trade and Cedar Streets in Charlotte. Prior to its introduction into evidence, the court conducted a *voir dire* hearing and held that "the list may be received into evidence" provided that "all other parts of the document (other than the robbery at Williams' Exxon) shall be eliminated from the exhibit . . . so that the jury will see only that portion relating to the Sloop Exxon Station matter."

[5-7] The general rule in North Carolina is that in a prosecution for a particular crime, evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged. *See, e. g., State v. Watson*, 287 N.C. 147, 214 S.E.2d 85 (1975); *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969); *State v. Fowler*, 230 N.C. 470, 53 S.E.2d 853 (1949). *See generally* E. Cleary, McCormick on Evidence, 444-454 (1972); 1 Stansbury, N.C. Evidence, § 91 (Brandis Rev.1973); 2 Strong, N.C. Index 2d, Criminal Law § 34 (1967). But, if the evidence of other offenses tends to prove any other relevant fact, it will not be excluded merely because it also shows the defendant to have been guilty of an independent crime. *See, e. g., State v. Grace*, 287 N.C. 243, 213 S.E.2d 717 (1975). *See generally* 1 Stansbury, *supra*, at § 91, and authorities there cited; 2 Strong, *supra*, at § 34.

The evidence complained of under this exception does not appear to be State's Exhibit 8-A, which was shown to the jury, and on which defendant had placed his check mark and initials beside a reference to the attempted armed robbery and murder at Williams' Exxon. On the contrary, defendant's exception appears to be directed to the testimony of the police officers preceding the introduction of State's Exhibit 8-A that tended to show defendant had placed a check mark and his initials beside other armed robberies on the list presented to him. Accordingly, defendant concludes that it made no difference that the other entries on the list had been deleted when State's Exhibit No. 8-A was introduced.

It is true that preliminary questioning showed defendant looked at a list and made several check marks and initials beside several armed robberies noted thereon. But, for the following reasons, we find no prejudicial error in the admission of this testimony.

First, it could be argued that since this evidence tended to prove another relevant fact, i. e., that defendant had admitted participating in the attempted robbery of Williams' Exxon, it was not excludable merely because it also showed defendant to have participated in other unspecified armed robberies in the Charlotte area. More importantly, when Officer Holmberg testified about a list of armed robberies presented to defendant, on which defendant made "several check marks," defendant made no objection. The North Carolina law on the failure to object in this situation is as follows: "The well established rule [is] that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost . . . ." *State v. Godwin*, 224 N.C. 846, 847, 32 S.E.2d 609, 610 (1945). *Accord, e. g., State v. Grace, supra*; *State v. Stegmann*, 286 N.C. 638, 653, 213 S.E.2d 262 (1975); *State v. Jenerett, supra*; *State v. Little*, 278 N.C. 484, 180 S.E.2d 17 (1971); *State v. Owens*, 277 N.C. 697, 178 S.E.2d 442 (1971); *State v. Perry*,

275 N.C. 565, 169 S.E.2d 839 (1969). Accordingly, even if the evidence of the other crimes was incorrectly admitted, its admission was rendered harmless by its prior admission without objection.

[8] Defendant next contends that the trial court committed prejudicial error in limiting defendant's right to cross-examine the witness W. O. Holmberg.

The question involved is intertwined with the admissibility of defendant's inculpatory statement. Defendant contends that he was faced with a choice of either letting the alleged statement go into evidence unchallenged or of examining Officer Holmberg concerning the circumstances surrounding the alleged statement and thereby bringing out further evidence concerning the polygraph examination. Accordingly, defendant concludes he was "boxed in" and such a choice deprived him of the right to effectively cross-examine Holmberg concerning the circumstances under which defendant's statement was made.

While defendant's counsel was cross-examining Officer Holmberg, he asked the court to provide him with further instructions as to questions regarding the polygraph examination. The trial judge excused the jury and the following exchange occurred:

"MR. HASTY: All right. If it please the Court, so that I will understand, now am I to take it that you do not want me to ask Mr. Holmberg—

"COURT: I don't care what you ask Mr. Holmberg.

"MR. HASTY: I understand.

"COURT: But my point is, you were in chambers very emphatic that you didn't want this about the polygraph to come out. Now, if you're going to ask Mr. Holmberg what he told him the day before, I'm going to let him tell them everything he told him the day before because it's not fair to let you have your cake and eat it, too.

"MR. HASTY: Well, sir, I, of course, realize that I could open the door, as they say, but I don't believe I would do that unless I specifically asked him about any test.

"COURT: No, sir. When you start saying what he told him the day before, then the State is entitled to have the whole thing spread on it.

"MR. HASTY: Then I take it that you would rule the same way if I were to ask him if he told him that it would be to his benefit to take the examination.

"COURT: The polygraph test, and you would have opened it up.

"MR. HASTY: All right sir.

"COURT: Now, you can't put in half about the polygraph test. If you don't want it before the jury, why that's a decision you will have to make.

"MR. HASTY: That's the exact argument I made to the Supreme Court, and that is, of course, what the Supreme Court is letting the State do, get in half of it, and I, of course, am saddled with that decision. I realize that. All right, sir.

"COURT: And you're asking him if he told him something about the polygraph test, and wanting the jury to infer he's telling him about this statement. Now, that I can't permit.

"MR. HASTY: Well, yes, sir.

"COURT: He is going to have to explain what he said to him was about a polygraph test. Now, this is where we come to.

"MR. HASTY: Of course, the State is doing the exact opposite thing, letting the jury infer that this was a statement given without fear of a polygraph, which is, of course, not true. I will, of course, abide by your feelings.

"COURT: I am just telling you what is going to happen. If you don't, I'm going to let the State bring it all in.

"MR. HASTY: I just wanted to see where the perimeters were."

In his brief, defendant's argument is as follows: (1) *State v. Foye, supra, State v. Williams, supra,* hold that the *results* of a polygraph test cannot be either directly or indirectly introduced into evidence; (2) in order for defendant to effectively cross-examine Holmberg as to the circumstances surrounding the alleged confession, it was necessary to elicit testimony pertaining to the polygraph test, which the aforementioned rule does not permit; (3) therefore, defendant has been deprived of his absolute right of cross-examination.

Defendant's argument is faulty in two respects. First, the evidence defendant refers to was not the *result* of any polygraph test and it was not elicited during the course of a polygraph examination. Hence, neither *Foye* nor *Williams* is directly applicable. Second, the trial judge, in answer to a question by the defense as to the scope of permissible cross-examination, stated that he did not care what defendant's counsel asked Holmberg. However, the court also noted that if defendant "opened the door" as to the polygraph issue, then he would permit the State to bring out all the circumstances regarding the polygraph examination on redirect. Defendant's argument falls of its own weight and does not support his contention that he was deprived of his absolute right to cross-examination.

"'One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses.'" *Barnes v. Highway Commission,* 250 N.C. 378, 394, 109 S.E.2d 219, 232 (1959), *quoting from* 1 Stansbury, N.C. Evidence, § 35 (Brandis Rev.1973). *See generally* E. Cleary, McCormick on Evidence § 19 (2d ed. 1972). Judge Snepp did not infringe upon defendant's right of cross-examination by any means. On the contrary, he told defendant's counsel "I don't care what you ask Mr. Holmberg." This assignment is therefore without merit and is overruled.

In his next assignment of error, defendant argues that the trial court should have granted his motion for judgment as in case of nonsuit.

Defendant was originally charged with conspiracy to commit armed robbery, armed robbery, and felony-murder. All three charges were consolidated at defendant's first trial; however, a judgment of nonsuit was entered as to the charge of armed robbery.

Defendant now argues that since our Court held in its first opinion that a conviction of conspiracy to commit armed robbery does not merge into the murder charge, but is a separate offense, it cannot be used as a basis for a felony-murder conviction under G.S. 14–17. Defendant therefore concludes that he stands improperly convicted of first-degree murder since there is no principal felony upon which to base the felony-murder rule. Defendant's argument is based upon a misinterpretation of this Court's opinion.

[9] It is well settled that "[w]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." *State v. Fox,* 277 N.C. 1, 17, 175 S.E.2d 561, 571. *Accord, State v. Carey, Jr., supra* (former appeal in the present case); *State v. Carey,* 285 N.C. 497, 206 S.E.2d 213 (companion case to the present one).

[10] G.S. 14–17 expressly provides that a murder perpetrated in an attempt to commit robbery is murder in the first degree. For this reason, at the first trial the trial court properly refused to submit the charge of armed robbery to the jury as a separate offense. It should not, however, have been nonsuited. Our statement to the contrary in the first opinion was an inadvertence. The theory of the State's case was that defendant and four others had conspired to rob with firearms the operator of a filling station and, in the attempted robbery, one of the conspirators, "Peanut" Mitchell, shot and killed James Sloop.

It is perfectly clear from the evidence that "Peanut" Mitchell was guilty of murder in the first degree, although he was later permitted to plead guilty to second degree murder.

State v. Fox, supra, holds in such a situation that all the conspirators are guilty of murder in the first degree. In the companion case of *State v. Carey, supra*, Justice Huskins, speaking for the Court, stated: "Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing with another or others to engage in an unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy." *State v. Gibson*, 233 N.C. 691, 65 S.E.2d 508 (1951).

"The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, *every party* to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. [Citations omitted.]" *State v. Carey, supra*, 285 N.C. at page 503, 206 S.E.2d at 218.

[11] It seems to us that the better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration or attempt to perpetrate a felony under the provisions of G.S. 14-17, would be that the solicitor should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule. *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975); *State v. Moore*, 284 N.C. 485, 202 S.E.2d 169 (1973). If the separate felony indictment is treated as surplusage, and only the murder charge submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. *State v. Peele*, 281 N.C. 253, 188 S.E.2d 326 (1972). So in this case it served no purpose to nonsuit the felony charge of armed robbery at the first trial and it should not have been done.

Nevertheless, this does not prevent the use of this fact (attempt to commit armed robbery) in the prosecution of the defendant for murder in the first degree. To establish the defendant's guilt, the State proves the defendant's participation in the conspiracy to rob. It is the proof of this fact which makes the defendant equally guilty with Mitchell, the trigger man, under the rule of *State v. Fox, supra*. The use of the fact that the defendant participated in the conspiracy to rob in order to tie him to the shooting of Mr. Sloop by Mitchell does not change the offense of murder. The proof of murder in the first degree is complete when the State proves beyond a reasonable doubt that Mitchell shot and killed Mr. Sloop in Mitchell's attempt to rob him. The conspiracy to rob is not an element of the murder. The offense of first-degree murder would have been the same had there been no conspiracy between Mitchell and this defendant. The purpose of proving the conspiracy is not to establish an element of the crime of first-degree murder, but to fasten responsibility therefor upon the defendant along with Mitchell.

[12] Conspiracy is a separate offense from the attempt to rob. Conspiracy is a completed crime when it is formed, without any overt act designed to carry it into effect. Thus, it follows that the conspiracy to rob does not merge into the offense of first-degree murder. The defendant can properly be sentenced for both offenses. *State v. Carey, Jr., supra; State v. Goldberg*, 261 N.C. 181, 202, 134 S.E.2d 334; *State v. Brewer*, 258 N.C. 533, 539, 129 S.E.2d 262; *State v. Davenport*, 227 N.C. 475, 494, 42 S.E.2d 686.

[13] It is clear, therefore, that the nonsuit motion of the defendant was properly overruled. It was entirely proper to submit the case to the jury as to the defendant's guilt of the separate offenses of conspiracy to rob and murder in the first degree. These offenses do not merge. This assignment of error is overruled.

In his next series of assignments, defendant contends: (1) That the trial court committed prejudicial error in allowing the State to cross-examine defendant's wife concerning prior inconsistent statements and by inquiring into the statements by reading them into evidence; (2) that the trial court committed prejudicial error in permitting the State to introduce defendant's wife's inconsistent statements into evidence; and (3) that the trial court erred in denying defendant's motion for a mistrial based on Nos. (1) and (2) above. Defendant has combined these questions in his brief for purposes of argument. We will do likewise.

Pamela Carey, defendant's wife, voluntarily testified for defendant and on direct examination more or less corroborated defendant's defense of alibi. However, on cross-examination, Pamela denied, among other things, that she knew James Calvin "Peanut" Mitchell before 10 July 1973 when she saw him at the Mecklenburg County jail. Upon further cross-examination Pamela admitted that she had signed two statements (State's Exhibits Nos. 12 and 13) in the presence of Officer H. R. Thompson on 10 July 1973. However, she denied having made any of the statements contained in either of these documents. Both of the prior statements indicated that Pamela had in fact known James Calvin "Peanut" Mitchell prior to 10 July 1973 and that she had been with her husband and "Peanut" and others on at least two occasions. State's Exhibit No. 12, about which Pamela was cross-examined, was offered into evidence by the State in rebuttal. It reads as follows:

"About a month ago, I don't remember whether it was morning or evening, but I had asked Butch [the defendant] to carry me to my mother's to check on her. When he left, he came back in about an hour. Tony Dorsey was with him and a boy named Peanut (I don't know his real name), and Anthony Carey. Butch asked me if I was ready to go, and I said I would be ready in a minute as I had just got out of the bathtub. We went up to 77. We got on 77 at Belhaven Boulevard. He went out 77 and he got off on Morehead. Butch said, 'I'll take you to your mother's in a minute. I want to stop right down here.' We then turned on the street next to the tuxedo rental place on South Boulevard. We turned down by that place and turned right, and he stopped at the first corner. I said, 'Since we are here, I'm going to stop and talk to Miss Evelyn.' Her sons were sitting on the porch. I saw Peanut raising up to get out, but I didn't pay any attention to where he was going.

"I talked to the boys on the porch, and then I walked up to Miss Bee's house where I saw Sheila Clark sitting on the porch. Then I talked to her about two or three minutes. When Butch left, he said, 'I'll be back in a minute.' Butch, Anthony and Tony pulled out. They were gone about five or ten minutes. They were gone just long enough to have ridden around the block. Then I got in the car. Anthony, Peanut, Tony and Butch were already in the car when I got in.

"Then they went up Park Avenue and they took me to my mother's house on Wilmore Drive, and I got out. Peanut was laying down in the back of the car until we got down to about South Tryon and Park Avenue, and then he raised up out of the back seat. I didn't see a gun or anything. They let me out at my mother's and I said, 'Wait and let me see if she's home.' Butch said he'd be back in about an hour. I was looking at T.V. that night at home by myself, and I saw where the U-Drive It on South Boulevard was robbed or something, but I

didn't pay attention to every detail. Then I got nervous and scared."

State's Exhibit No. 13 referring to 9 June 1973, about which Pamela was cross-examined, was offered into evidence by the State in rebuttal. It reads as follows:

"I was at home over on Oregon Street and Butch, Anthony, Tony and Peanut came by the house to get me. Butch said, 'Are you ready to go to the store?' I said, 'Yes, I'm ready.' Butch gave me a ten dollar bill and Tony, Anthony, Peanut, Butch and I got in the car. We came up to Rozzell's Ferry Road and Butch parked in the parking lot at Norman's Grocery Store. I got out and I went in the store. I stayed in there about fifteen minutes looking and seeing what I wanted to buy. As I came out the door, I saw Peanut running up the street, and he turned a corner to the left beside the store, and the boy who was running behind him stopped at the corner, and he put a gun up and he pulled the trigger. He didn't look around to see if anybody was standing on the street or nothing and just started shooting. He shot once. Peanut ran to the left beside the store. There was a truck there, and he got behind the truck and then ran on up the path. You can go up that path and get to where we stay.

"When Butch saw Peanut running, he drove off. Anthony, Tony and Butch were all in the car when he pulled out. They came back and picked me up and took me home. When we got there, Peanut was upstairs just sitting in a room. I saw him messing with his arm, and Peanut said, 'I can get it out.' and he took a knife he had in his pocket and pulled a little shot out of his shoulder. I told Butch to get Peanut out of the house and not to bring him back any more. I gave Butch the change, and he handed me three dollars back and told me to keep it. They all left in the car, and they came back without Peanut a little later."

G.S. 8-57 provides, in pertinent part, as follows: "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

[14, 15] When defendant's wife was examined as a witness for defendant, she was therefore subject to be cross-examined to the same extent as if unrelated to him. *State v. Bell*, 249 N.C. 379, 381, 106 S.E.2d 495, 497 (1959). *See also State v. Tola*, 222 N.C. 406, 23 S.E.2d 321 (1942). Accordingly, if based on information and asked in good faith, it was permissible for the district attorney to ask Pamela Carey about *her* prior inconsistent statements as they related to *her* previous relationship with "Peanut" Mitchell for purposes of impeachment. *See State v. Bell, supra.* See also *State v. Mathis*, 13 N.C.App. 359, 185 S.E.2d 448 (1971), where the Court of Appeals dealt with a similar problem. *See generally* Comment, A Survey of the North Carolina Law of Relational Privilege, 50 N.C.L.Rev. 630 (1972). Both of Pamela's inconsistent statements revealed that she knew "Peanut" Mitchell prior to the date of this offense. But in neither of these statements does she say that her husband was involved in other crimes. In fact, she puts herself at a substantial distance from the events. In State's Exhibit No. 13 she does indicate that she heard about a robbery on the T.V. program that night. By this she certainly does not involve the defendant in that armed robbery. So the contention of the defendant that she could not be cross-examined on matters concerning her husband's unrelated criminal offenses has no application to the facts of this case. The statements about which Pamela was cross-examined, and which were later offered into evidence, did nothing more or less than show that Pamela

had made two prior inconsistent statements and by these she acknowledged that she had known "Peanut" Mitchell for more than a month before the date of the statements on 10 July 1973.

[16] Justice Ervin in the landmark case of *State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954), sets forth the rule upon which defendants rely:

"The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. [Citations omitted.] This is true even though the other offense is of the same nature as the crime charged. [Citations omitted.]"

Then follows the eight exceptions to the rule. We believe that one of these is applicable to our case. It reads:

"6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. [Citations omitted.] Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity." *Id.* at 176, 81 S.E.2d at 367.

The defendant contends that the court committed prejudicial error by permitting the cross-examination of Pamela as to prior inconsistent statements and by the introduction of those inconsistent statements because they tended to implicate defendant in other unrelated crimes. We do not believe this to be so, but if it is subject to this interpretation, Rule 6 of the exceptions in *McClain, supra*, is authority for its competency.

Accordingly, for the reasons stated herein, these assignments are overruled.

Defendant next contends that he was denied a fair and impartial trial due to the remarks, actions, and arguments made to the jury by the district attorney. During the cross-examination of Pamela Carey, she indicated that she had signed State's Exhibits Nos. 11, 12 and 13, but stated that she did not remember making any of those statements. At this time, the following occurred:

"MR. HASTY: If it please the Court, I would like for you to instruct the Solicitor to stop making facial expressions.

"COURT: Speak up, Mr. Hasty.

"MR. HASTY: I would like for you to instruct the Solicitor to stop making facial expressions to the jury in reply to the witness's question.

"COURT: I haven't observed him.

"MR. HASTY: Well, sir, I did.

"COURT: Well, I have not.

"MR. HASTY: All right, sir."

If defendant had wished to preserve this exception on appeal, then he should have attempted to place in the record what he complained were the facial expressions of the solicitor and how such expressions were prejudicial to him. There is nothing in the record to indicate what they were, and therefore, there is nothing for us to decide. For this reason, this contention is dismissed.

[17] Defendant's second contention under this general heading relates to the comments of the district attorney in his argument to the jury. The district attorney was discussing the alleged confession to Officer Holmberg in the presence of Officers Starnes and Whiteside when he said: "And he was brought in a list of armed robberies and said 'check these things off and put your name, put your initials by the ones that you were involved in,' *and that one was checked.*" (Emphasis supplied.) We find nothing objectionable in this statement. It seems to be only a reasonable comment on the evidence. State's Exhibit 8–A, as limited by the trial judge, had

previously been offered into evidence as part of defendant's purported confession. This assignment is overruled. *See, e. g., State v. Stegmann, supra; State v. Monk*, 286 N.C. 509, 212 S.E.2d 125.

[18] Defendant next contends that the solicitor engaged in impermissible jury argument when he told the jury that the "trigger" man was "Peanut" Mitchell, who was fifteen-years-old at the time, as compared to the defendant who was twenty-three-years-old. The district attorney further argued that it was not justice for a fifteen-year-old to carry the burden alone for the murder of Mr. Sloop; that the responsibility of the crime lay upon the shoulders of defendant Carey; that defendant Carey had been picking up "Peanut" Mitchell from time to time from May until July 1973; and that as a result of the planning of the defendant, a man was killed. This argument is certainly legitimate under all the evidence presented in this case. The district attorney did not venture into an area forbidden by this Court. He in no way created an atmosphere which prohibited the jury from arriving at the truth based upon the evidence. "In this jurisdiction wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge." *State v. Williams*, 276 N.C. 703, 712, 174 S.E.2d 503, 509 (1970). *Accord, State v. Stegmann, supra; State v. Monk, supra; State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Defendant next contends that the trial court committed prejudicial error in refusing to give defendant's requested instructions to the jury. In his brief, counsel for defendant states he understands that it is well within the trial court's province to select the manner and wording of the charge to the jury and that the court has discretion so long as it presents to the jury an accurate explanation of the law which applies in each case. Defendant argues that the instructions which were requested present the law applicable in a light which is neither more favorable to the State nor to the defendant. Defendant fails to state a proper cause for relief in this instance and his objections are all overruled.

Defendant next contends that the trial court committed prejudicial error in certain other portions of his charge to the jury. We have closely examined all of the instructions complained of and find them to be free from any prejudicial error. Therefore, these assignments are all overruled.

[19] Finally, defendant complains that it was error for the trial judge to enter the judgment of death. Defendant contends that the death penalty is not authorized under the Constitution and the statutes of North Carolina. This Court has heretofore considered and a majority has consistently rejected all of the arguments on this point and does so here. *See, e. g., State v. Gordon*, 287 N.C. 118, 213 S.E.2d 708 (1975); *State v. Boyd*, 287 N.C. 131, 214 S.E.2d 14 (1975); *State v. Burns*, 287 N.C. 102, 214 S.E.2d 56 (1975); *State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106 (1975); *State v. Avery*, 286 N.C. 459, 212 S.E.2d 142 (1975); *State v. Williams*, 286 N.C. 422, 212 S.E.2d 113 (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E.2d 712 (1974); *State v. Honeycutt*, 285 N.C. 174, 203 S.E.2d 844 (1974); *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E.2d 6 (1974); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974); *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973). No useful purpose would be served in reiterating the reasons for the above decisions. The death sentence was the only one that the court below could impose upon a conviction of first-degree murder under authority of *State v. Waddell, supra*.

The defendant, age twenty-three, used James Calvin "Peanut" Mitchell, age fifteen, to accomplish the murder. He has been twice convicted by a jury. We have carefully considered the entire record and all of defendant's assignments of error. In

his trial and conviction we find no error. The majority of this Court also holds that the sentence of death should be sustained. However, for the reasons stated in the dissenting opinions to *State v. Williams, supra*, 286 N.C. at 434-441, 212 S.E.2d at 121-125, Chief Justice Sharp, Justices Copeland and Exum, dissent from that portion of this opinion affirming the imposition of the death sentence and vote to remand for the imposition of a sentence of life imprisonment.

No error.

LAKE, J., concurs in result.

SHARP, Chief Justice (dissenting).

According to the State's evidence, Mr. Sloop died 3 July 1973 from wounds inflicted by a sawed-off-shotgun discharged by James Calvin "Peanut" Mitchell on 19 June 1973.

Defendant testified he did not know Mitchell prior to his arrest on 10 July 1973 on charges relating to the attempted robbery of 19 June 1973.

Pamela Carey, defendant's wife, testified she first met Mitchell on 10 July 1973 when she and her mother went to the Mecklenburg jail.

The court admitted in evidence, over defendant's objections, State's Exhibits 12 and 13, statements purporting to have been made by Pamela on 10 July 1973. At trial, under cross-examination, Pamela admitted she had signed these exhibits but testified the statements therein were not true.

Exhibit 12 shows that the statement first quoted in the court's opinion was made with reference to "Complaint # 73-50216; Re: U-Drive It Rental Company; 1501 South Boulevard; Armed Robbery 6/8/73." Exhibit 13 shows that the statement last quoted in the court's opinion was made with reference to, "Complaint # 73-50268; Re: Wyatt's Spur Station; 2815 Rozzells Ferry Road; Armed Robbery; 6-9-73."

When Exhibits 12 and 13 were admitted, the court instructed the jury they were for consideration only as bearing upon the credibility of Pamela's testimony *not* as bearing upon the guilt of the defendant.

The statements in these exhibits indicate that Pamela had testified falsely when she said she had not known Mitchell prior to 10 July 1973. However, they go far beyond the purpose for which they were purportedly offered, that is, to discredit Pamela's testimony by prior inconsistent statements. They are to the effect that defendant also testified falsely when he said he had not known Mitchell until after his arrest in connection with the attempted robbery of 19 June 1973. Further, although they fall far short of charging defendant, Mitchell, and others, with robberies on South Boulevard and on Rozzells Ferry Road the statements strongly suggest that defendant was involved in these robberies with Mitchell and others.

In *State v. Reid*, 178 N.C. 745, 747, 101 S.E. 104, 105 (1919), Justice (later Chief Justice) Hoke, speaking for the Court said: "Under our statute, (Revisal, §§ 1634, 1635) [G.S. 8-57, 1974 Supp.] the wife was neither competent nor compellable to testify to her husband's hurt in a proceeding of this character, and *a fortiori* her declarations against him should not be received when not made in his presence nor by his authority." Also, see *State v. Warren*, 236 N.C. 358, 360, 72 S.E.2d 763, 764 (1952), *State v. Dillahunt*, 244 N.C. 524, 94 S.E.2d 479 (1956); 1 Stansbury's North Carolina Evidence (Brandis Rev.1972) § 59. Since the introduction or use of such evidence is forbidden by statute, in the furtherance of public policy, it is the duty of the trial judge, on his own motion, to disallow the evidence. *State v. Warren, supra*, 236 N.C. at 360, 72 S.E.2d at 764.

Assuming arguendo that whether Pamela knew "Peanut" Mitchell on June 8th and 9th was material and not collateral to the issue whether defendant participated with him in the robbery on June 19th, the sole purpose for which these exhibits were admissible might have been attained by exercising all portions of the statements except those to the effect that Pamela knew

Mitchell and was with him and others on June 8th and June 9th of 1973. The instructions that the jury exclude from their consideration the prejudicial effect of these exhibits upon the credibility of defendant and upon his guilt was a futile gesture. *See State v. Gardner*, 226 N.C. 310, 37 S.E.2d 913 (1946).

The Court holds applicable to the present factual situation the rule that "[e]vidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission," this being the sixth exception to the exclusionary rule as stated by Justice Ervin in *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 367 (1954). I disagree. When this exception is applicable the other crimes must be proven by competent substantive evidence, not by declarations admissible solely to impeach the credibility of the testimony of a defense witness. *See* 1 Stansbury's North Carolina Evidence (Brandis Rev.1972) § 46.

For the reasons stated I vote to remand the case to the Superior Court for a trial *de novo*.

BRANCH, J., concurs in this dissenting opinion.

Laurie PRITCHETT et al., Petitioners,

v.

Paul W. CLAPP et al., Respondents.

No. 85.

Supreme Court of North Carolina.

Oct. 7, 1975.

Retired employees of High Point police department sought judicial review of orders of the board of examiners of the High Point policemen's pension and disability fund denying an application for disability retirement benefits and terminating benefits previously awarded. The Superior Court, Guilford County, Julius A. Rousseau, Jr., J., rendered judgment for the employees and the board appealed. The Supreme Court, Sharp, C. J., held that under a 1973 statutory revision, the High Point policemen's entitlement to disability benefits was not limited to disability resulting from injury sustained in the actual performance of their duties as policemen, and a statutory provision providing benefits to policemen disabled from injuries sustained in the actual performance of their duties was repealed.

Affirmed.

Municipal Corporations ⇐176(3)

Under 1973 statutory revision, High Point policemen's entitlement to disability benefits was not limited to disability resulting from injuries sustained in the actual performance of their duties as policemen, and statutory provision providing benefits to policemen disabled from injuries sustained in actual performance of their duties was repealed. Laws 1955, c. 496, §§ 3, 4; Laws 1973, c. 282, §§ 2, 3, 7; Laws 1975, c. 691, §§ 4, 5; G.S. § 128–27(c).

Appeal by defendants from Rousseau, J., 23 December 1974 Session of Guilford County Superior Court, certified for initial appellate review by the Supreme Court of North Carolina pursuant to G.S. § 7A–31(a), docketed and argued as Case No. 81 at the Spring Term 1975.

This is a proceeding to obtain judicial review of orders of the Board of Examiners (Board) of the High Point Policemen's Pension and Disability Fund (Fund) denying the application of petitioner Pritchett for disability retirement benefits and terminat-

Appendix B:

Pp. 26-140, Brief for Petitioner, Fowler v. North Carolina, No. 73-7031.

intractable judgment is to be made in numerous covert ways which conceal while increasing the irregularity, irrationality, and irresponsibility of the life-or-death decisions. (*See* Part II, pp. 26-101 *infra.*) Moreover, the historical lesson learned through decades of overtly discretionary capital sentencing – that the death penalty is no longer "widely accepted,"[32] but is instead resoundingly repudiated by the institutions of criminal justice that have actually borne the terrible responsibility for choosing between life and death as the disposition for even the most heinous of offenders (*see* Part III, pp. 102-140 *infra*) – is to be ignored, as though it never happened. With all respect, this result is heedless of *Furman*, heedless of reality and history, and forbidden by the Eighth and Fourteenth Amendments.

II.

THE ARBITRARY INFLICTION OF DEATH

Although the prevailing *Furman* opinions differ somewhat in regard to the questions left unanswered by the square holding of that case, each opinion condemns at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic

[32] *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

selective processes.[33] *Furman* thus accords contemporary recognition to a central historic concern of the

[33] The concurring opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-373) shared the view that the death penalty is unconstitutional *per se* regardless of the presence or absence of selectivity in the procedural system through which it is administered.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional" if it were in fact applied wholly non-selectively, 408 U.S. at 257, but held the death sentences under review in *Furman* and companion cases incompatible "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments," *ibid.*, because they were "imposed pursuant to a procedure that gives room for the play of . . . prejudices," 408 U.S. at 242, and allows the application of capital punishment "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U.S. at 245.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question" whether "the infliction of the death penalty is constitutionally impermissible in all circumstances," 408 U.S. at 306, since he found that the death sentences under review were returned "under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore violated the Eighth and Fourteenth Amendments. "[O]f all of the people convicted of rapes and murders . . ., many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote ommitted).

Mr. Justice White declined to consider the question whether "the death penalty is unconstitutional *per se*," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

Eighth Amendment: "that government by the people, instituted by the Constitution, ... not imitate the conduct of arbitrary monarchs." *Weems v. United States*, 217 U.S. 349, 376 (1910).

As this Court has recognized,[34] the Cruel and Unusual Punishments Clause of the Eighth Amendment is derived from the almost identically worded Tenth Clause of the English Bill of Rights of 1689.[35] The preamble to the Bill of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament."[36] The first two Clauses accordingly declared such conduct on the part of the King and the royal

[34] *In re Kemmler*, 136 U.S. 436, 446 (1890).

[35] Modern historical scholarship lends support to this conclusion. *See* SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41 (1971). The "Declaration of Rights," which William and Mary signed on February 13, 1689, before their coronation, was reenacted with minor additions as a statute (the "Bill of Rights") by Parliament later that year. 1 W. & M., sess. 2, ch. 2 (1689), VI STAT. OF THE REALM 142-145. *See also* 5 PARL. HIST. ENG. 483-490 (1688-1704) (Cobbett ed. 1809); BROWNING, ENGLISH HISTORIC DOCUMENTS 1660-1714 122-128 (1953); BAXTER, BASIC DOCUMENTS OF ENGLISH HISTORY 159 (1968). Clause 10 provides: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[36] Of particular concern to Parliament was James II's claim that the royal prerogative authorized him to ignore the statutes prescribing religious qualifications for the holding of public office, 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 87, 89 (1938), and to imprison subjects when no statute or common law principle authorized such a punishment, 2 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 515 (1850). This royal claim was facilitated by the 1686 decision of the King's Bench in *Godden v. Hales*, 2 Show. K.B. 475, 89 Eng. Rep. 1050, 11 Howell St. Tr. 1197 (Trinity Term, 2 Jac. 2) (1686), a collusive action arranged by James II before handpicked judges to secure judicial approval of the royal power arbitrarily to disregard the enactments of Parliament. KENYON, THE STUART CONSTITUTION, 1603-1688 420-426 (1966). The Court ruled: "That the laws of England are the King's laws, That therefore it is an inseparable prerogative in the Kings of England to dispense with penal laws in particular cases and upon particular reasons, That of those reasons and those necessities the King himself is the sole judge." 11 Howell St. Tr. at 1199. This decision confirmed the Parliamentary belief "that the Crown must be limited, controlled, and [made] inferior to the laws of the land," HUGHES & FRIES, CROWN AND PARLIAMENT IN TUDOR–STUART ENGLAND 291 (1959); the realization by both Whigs and Tories "of the inadequacy of the laws of Parliament to withstand the attacks of the King was the beginning of their rejection of James and the real commencement of the revolution of 1688." *Id.* at 294.

judges illegal,[37] and Clause 10 prohibited the infliction of "cruel and unusual punishments." The legislative history of this provision makes clear that it was intended to prohibit the infliction of harsh punishments that were arbitrarily imposed.[38]

While the Bill of Rights was pending in Parliament, an Anglican clergyman, Titus Oates, appealed his 1685 perjury conviction to the House of Lords. Oates had

[37] These two Clauses flatly overruled *Godden v. Hales*, *supra* note 36, declaring:

> "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). A significant new phrase was also added to the Coronation Oath: henceforth, the ascending monarch was to swear to govern according to "the statutes in Parliament agreed upon, and the laws and customs of the same." WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY 3, 37 (1960). "The oath in its previous form had pledged the King to 'grant and keep' the laws and customs 'granted' by his predecessor. If the laws were merely the King's grants, then it might be contended that he could revoke them. Henceforth, it was plain that he was bound by the laws." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 176-177 (1938).

[38] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 859 (1969); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 844 (1972).

been convicted in the King's Bench of giving false testimony during the "Popish Plot" trials of 1678-1679, and had been sentenced to be defrocked, to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to be pilloried four times a year.[39] This punishment was harsh,[40] discriminatory and arbitrary in the extreme – a manifest attempt to avenge Oates' anti-Catholic intrigues against James II (who had then been Duke of York) by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court.[41]

[39] For discussions of this phase of the *Oates* case, see CLARK, THE LATER STUARTS, 1660-1714 88-92 (1934); BROWNING, ENGLISH HISTORICAL DOCUMENTS, 1660-1714 12-15 (1953); 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 61-65 (1938); LANDON, THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689 181-183 (1969).

[40] The lengthy flogging prescribed for Oates was apparently intended to be fatal: "the court, having no power to hang him, plainly intended that he should be flogged to death." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642-1801 142 (1938). This was the contemporary understanding of the court's intent. In 1689, the House of Commons resolved "[t]hat it was illegal, cruel, and of dangerous example that a freeman [Oates] should be whipped in such a barbarous manner, as, in all probability, would determine in death." 5 PARL. HIST. ENG. 387 (1688-1704) (Cobbett ed. 1809).

[41] Imprisonment for life could not at that time be imposed for perjury (a misdemeanor), 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1660-1801 142 (1938); and "[o]nly a spiritual court could degrade a priest," *ibid.* According to Macaulay, "that the sentence [imposed on Oates] was illegal was a proposition that admitted of no dispute." 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 308 (1850).

[3b]

Oates' conviction and sentence were affirmed in the House of Lords, with thirteen of the Members dissenting strongly on the grounds that these punishments were "cruel, barbarous, and illegal" and "contrary to the Declaration [of Rights] of the 12th of Feb. last . . . whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual punishments inflicted."[42] Oates

[42] 5 PARL. HIST. ENG. 291-292 (1688-1704) (Cobbett ed. 1809). This dissent declared:

> "1. 'For that the King's-bench, being a temporal court, made it part of the Judgment, That Titus Oates, being a clerk, should, for his perjuries, be divested of his canonical and priestly habit, and to continue divested all his life: which is a matter wholly out of their power, belonging to the ecclesiastical courts only. 2. For that the said Judgments are barbarous, inhuman, and unchristian. And there is no precedents [sic] to warrant the punishments of whipping, and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him ... 4. For that this will be an encouragement, and an allowance, for giving the like cruel, barbarous, and illegal Judgments hereafter, unless this Judgment be reversed. 5. Because sir John Holt, sir Henry Pollexfen, the two Chief Justices, and sir Robert Atkins chief baron, with six Judges more (being all that were then present), for these and many other Reasons, did, before us, solemnly deliver their Opinions; and unanimously declare, That the said Judgments were contrary to law, and ancient practice; and therefore erroneous, and ought to be reversed. 6. Because it was contrary to the Declaration of the 12th of Feb. last, which was ordered by the lords spiritual and temporal, and commons, then assembled; and by their Declaration ingrossed in parchment, and inrolled among the Records of parliament, and recorded in Chancery; whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual punishments inflicted.' "

then sought relief in the House of Commons, where his cause was strongly taken up by militant Protestants, who secured passage of a resolution "That Bills be brought in to reverse the Judgments against Mr. Oates . . . as cruel and illegal."[43] Sir William Williams declared during the debate on this bill: "let any man give us a precedent to square with that Judgment. It makes the Judges arbitrary, and hereafter the Judges may be most injurious in punishing."[44] When a deadlock occurred with the House of Lords over a collateral matter,[45] one of the floor managers from the Lords (whose bill gave Oates more limited relief than the Commons bill) admitted that the Oates judgment was illegal but declared that Oates deserved punishment for his libels. A Member of Commons responded:

> " 'Be it so. This bill gives him no indemnity. We are quite willing that, if he is guilty, he shall be punished. But for him, and for all Englishmen, we demand that punishments shall be regulated by

[43] 5 PARL. HIST. ENG. 296 (1688-1704)(Cobbett ed. 1809).

[44] *Id.* at 294.

[45] The Commons had also declared that the perjury judgements against Oates were "corrupt." 5 PARL. HIST. ENG. 392 (1688-1704) (Cobbett ed. 1809), and it was this allegation that the Lords would not agree to. *Id.* at 394.

[4b]

law, and not by the arbitrary discretion of any tribunal.' "[46]

By the time of the framing of the American Bill of Rights, eight States had adopted prohibitions of "cruel and unusual punishments" that were modeled upon

[46]3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 310 (1850). The floor managers of the Commons bill reported back to the House of Commons on their difficulties in securing an acceptable compromise bill from the House of Lords:

> "the commons had hoped, that, after the Declaration [of Rights] presented to their majesties upon their accepting the crown (wherein their lordships had joined with the commons in complaining of the cruel and illegal punishments of the last reign; and in asserting it to be the ancient right of the people of England, that they should not be subjected to cruel and unusual punishments; and that no judgments to the prejudice of the people in that kind ought in any-wise to be drawn into consequence, or example); and after this Declaration had been so lately renewed in that part of the Bill of Rights which the lords had agreed to; they should not have seen Judgments of this nature affirmed, and been put under a necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious consequence to the people, if, so soon after, such Judgments as these stand affirmed, and be not taken to be cruel and illegal within the meaning of those Declarations—That the commons had a particular regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it, that they are erroneous, cruel, illegal, and of ill example to future ages. . . . That it was surely of ill example for a temporal court to give judgment, 'That a clerk be divested of his canonical habits; and continue so divested during his life.' That it was of ill example, and illegal, that a judgment of perpetual imprisonment should be given in a case, where there is no express law to warrant it."

5 PARL. HIST. ENG. 386-387 (1688-1704) (Cobbett ed. 1809). Oates was pardoned by King William before the differences between Commons and Lords were finally resolved. *Id.* at 399.

Clause 10 of the English Bill of Rights,[47] and the federal government had inserted a similar provision into the Northwest Ordinance of 1787.[48] Because early American legal history is so obscure, it is not possible to know exactly what the draftsmen of these provisions intended.[49] However, whatever else such clauses were

[47]Virginia Constitution of 1776, Declaration of Rights, §9 (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909); (*see also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS OF 1791 35-36, 232 (1955)); Delaware Declaration of Rights of 1776, §16 (1 Del. Code Ann. §83 (1953)); North Carolina Constitution of 1776, §10 (5 THORPE, *supra*, at 2788); Maryland Constitution of 1776, §22 (3 THORPE, *supra*, at 1688); Massachusetts Constitution of 1780, art. 26 (3 THORPE, *supra*, at 1892); New Hampshire Constitution of 1784, §33 (4 THORPE, *supra*, at 2457); Pennsylvania Constitution of 1790, art. 9, §13 ("... nor cruel punishments inflicted") (5 THORPE, *supra*, at 3101); South Carolina Constitution of 1790, art. 9, §4 ("... nor cruel punishments inflicted") (6 THORPE, *supra*, at 3264). *Cf.* Vermont Constitution of 1777, ch. 2, §35 (6 THORPE, *supra*, at 3747): "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes ...."

[48]Ordinance of 1787, The Northwest Territorial Government, art. II (Confederation Congress, July 13, 1787): "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." *See* 1 U.S.C. xxxvii-xxxviii (1964).

[49]"Legal development is probably the least known aspect of American colonial history. Judicial opinions were not recorded in the colonies, no year books were issued, and the printed materials for legal and judicial history have been so scanty as to preclude the more cautious historians from dealing with this important side of colonial life." MORISON (ed.), RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680 unpaginated preface (1933).

[5b]

intended to prohibit, it is unlikely that they were not intended to guard against the arbitrary infliction of harsh punishments. For there is evidence that the colonists were concerned with this issue. In 1635, Governor John Winthrop described the attempts of the Massachusetts Bay Colonists to draft a comprehensive criminal code in order to limit the discretion of the magistrates: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws."[50] The writings of Blackstone, whose influence on the development of colonial American law was enormous,[51] had echoed the 1689 Parliamentary debates concerning the *Oates* case by stressing the fact that English law did not allow the arbitrary infliction of punishment:

> "it is moreover one of the glories of our English law, that the nature, though not always the quality or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment,

[50] WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686 5 (1889).

[51] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 862 (1969). Edmund Burke announced to Parliament in 1775 that almost as many copies of Blackstone's *Commentaries* had been sold in the American colonies as in Great Britain. SUTHERLAND, THE LAW AT HARVARD 25 (1967).

> which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slave to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under . . . . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions."[52]

Finally, the American statesmen who framed the state and federal prohibitions on cruel and unusual punishments in the late Eighteenth Century typically believed that their rebellion against Britain had been justified in order to preserve their inherited English civil rights and political freedoms:[53] "from a purely legal interpretation, the American Revolution itself, as the Americans saw it, was largely the result of England's disregard of the common-law rights of the Colonists."[54] It therefore appears unlikely that they would consciously have

[52] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 371-372 (1st ed. 1769).

[53] *See* BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 1-54 (1967).

[54] LEVY, ORIGINS OF THE FIFTH AMENDMENT 337 (1968).

rejected or limited any of their traditional liberties,[55] including the right against arbitrary infliction of harsh punishments. George Mason, the author of both the Virginia Declaration of Rights and the amendments proposed to Congress by the Virginia ratifying convention,[56] stressed the necessity of limiting all forms of American governmental authority by such guarantees of individual liberty:

"In the declaration of rights which that country [Great Britain] has established, the truth is, they

[55]The legislative history of adoption of the Eighth Amendment is sparse and not particularly illuminating as to the purposes of the Framers. *See* 2 ELLIOT'S DEBATES 111 (2d ed. 1863); 3 ELLIOT'S DEBATES 447-448, 451, 452 (2d ed. 1863); 1 ANNALS OF CONGRESS 754 (1st Cong., 1st Sess. 1789). There is evidence, however, that in certain ratifying conventions, opponents of the Constitution feared that, without a Bill of Rights, Congress would be free to devise whatever criminal punishments it wished and that tortures might be instituted. Patrick Henry, for example, declared to the Virginia Convention: "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives [in Congress] .... Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control [a constitutional prohibition on "cruel and unusual punishments"]? .... You let them loose; you do more – you depart from the genius of your country." 3 ELLIOT'S DEBATES 447-448 (2d ed. 1863). There is thus some evidence that the Framers were concerned to limit the discretion of *legislators* to devise punishments, and there is no indication whatsoever in any of the debates that they would have approved an arbitrary freedom on the part of magistrates to impose criminal punishments.

[56]*See* 1 ROWLAND, LIFE OF GEORGE MASON 234-250 (1892).

> have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite ....
>
> But although ... it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of Government ...."

1 ANNALS OF CONGRESS 436 (1st Cong., 1st Sess. 1789).

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose, of course, from various procedures[57] whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[58] But – particularly in the light of *McGautha v. California*, 402 U.S. 183 (1971) – it is impossible to read *Furman* as prohibiting only the explicit statutory annunciation of jury discretion to impose alternative sentences of imprisonment or capital punishment. Surely *Furman* and the Eighth Amendment forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[59] whatever the source or mechanism of the arbitrariness. See *Commonwealth v. A Juvenile*, 1973

[57]For a description of some of these variations, see *State v. Rhodes*, _____Mont. _____, 524 P.2d 1095, 1099 (1974).

[58]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[59]*Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

[74]

Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[60] The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[61] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with their result. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay*, 389 U.S. 128, 135-137 (1967); *Jackson v. Denno*, 378 U.S. 368, 391 n.19 (1964), It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot – as Justice Holmes wrote in another context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

[60] In *Commonwealth v. A Juvenile*, the Massachusetts Supreme Judicial Court held a "mandatory" death penalty statute unconstitutional under the Eighth Amendment where death was the "mandatory" punishment for a specified crime but discretionary mechanisms existed by which a trial court could avoid subjecting a particular defendant to that "mandatory" sentence. The case involved a juvenile who had been condemned under a statute which made death the "mandatory" punishment for rape-murder. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was mandatory, see Mass. Gen. Laws Ann. c. 265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since *Furman* invalidated "*discretionary* imposition of the death sentence." 300 N.E.2d at 442 (emphasis in original).

[61] *Furman v. Georgia, supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

To be sure, *Waddell's* annulment of the North Carolina "recommendation" statute ostensibly made death the exclusive punishment for first degree murder, rape, first degree burglary and arson. But the implementation of the death sentence for this broad range of offenses inevitably required the exercise of vast and uncontrolled selective discretion by district attorneys, trial judges, juries and the Governor in choosing which defendants would live and which would die in cases where the death penalty was potentially applicable after *Waddell*. Language requires that the several practices through which unrestrained and arbitrary discretion infects the administration of the death penalty under *Waddell* be described separately, as we shall do in the following subsections of this brief. But the practices plainly operate cumulatively to produce the kind of extreme uncertainty and unpredictability in the infliction of the death penalty that violates *Furman's* ban.

> "There is . . . danger in treating any one stage [of the criminal justice process] as if it were a self-contained system rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions. An assumption, explicit or implied, that adjudication is in fact a quasi-automatic, nondiscretionary process, turning solely on matters of sufficient evidence, is a gross oversimplification . . . ."

NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 150 (1966).[62] Thus as demonstrated by Professor Charles

[62] *See also* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 14-15 (1972).

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Black in his recent trenchant analysis,[63] the result of

[63]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). Professor Black points out the numerous discretionary decisions made at every stage of the criminal justice process, with life and death consequences, and emphasizes:

> "Regarding *each* of these choices, through all the range, one of two things, or perhaps both, may be true.
>
> First, the choice made may be a mistaken one. The defendant may not have committed the act of which he is found guilty; the factors which ought properly to induce a prosecutor to accept a plea to a lesser offense may have been present, though he refused to do so; the defendant may have been 'insane' in the way the law requires for exculpation, though the jury found that he was not. And so on.
>
> Secondly, there may either be no legal standards governing the making of the choice, or the standards verbally set up by the legal system for the making of the choice may be so vague, at least in part of their range, as to be only *apparent* standards, in truth furnishing no direction and leaving the actual choice quite arbitrary.
>
> These two possibilities have an interesting (and, in the circumstances, tragic) relationship. The concept of *mistake* fades out as the *standard* grows more and more vague and unintelligible. There is no vagueness problem about the question 'Did Y hit Z on the head with a piece of pipe?' It is, for just that reason, easily possible to conceive of what it means to be 'mistaken' in answering this question; one is 'mistaken' if one answers it 'yes' when in fact Y did not hit Z with the pipe. It is even fairly clear what it means to be 'mistaken' in answering the question 'Did Y *intend* to kill Z?' Conscious intents are facts; the difference here really is that, for obvious reasons, *mistake is more likely* in the second case than in the first, for it is hard or impossible to be confident of coming down on the right side of a question about past psychological fact.

(continued)

numerous interrelated arbitrary processes in the administration of the death penalty in North Carolina is exactly the result condemned by *Furman*: death sentences which are "wantonly and . . . freakishly imposed." *Furman v. Georgia, supra,* 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

And this means not merely that a few men die for crimes no more atrocious than the crimes of many who are spared.[64] It means also that society's most extreme and irremediable punishment is likely to be practiced principally upon the outcast of society. Discrimination is inseparable from arbitrariness wherever social atti-

(footnote continued from preceding page)

> It is very different when one comes to the question, 'Was the action of which the defendant was found guilty performed in such a manner as to evidence an 'abandoned and malignant heart'?' (This phrase figures importantly in homicide law.) This question has the same grammatical form as a clearcut factual question; actually, through a considerable part of its range, it is not at all clear what it means. It sets up, in this range, not a standard but a *pseudo-standard*. One cannot, strictly speaking, be *mistaken* in answering it, at least within a considerable range, because to be mistaken is to be on the wrong side of a line, and there is no real line here. But that, in turn, means that the 'test' may often be no test at all, but merely an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.
>
> 'Mistake' and 'arbitrariness' therefore are reciprocally related."

Id. at 19-21 (emphasis in original).

[64]*See, e.g.*, LAWES, TWENTY THOUSAND YEARS IN SING SING 302, 307-310 (1932); DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 254-255 (1962); De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n.2 (1968) (quoting Commissioner A. Frank Lee, of the Alabama Board of Corrections).

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tudes make men or groups unequal or unpopular. That had not ceased to be the case in England three centuries after Titus Oates,[65] and it assuredly has not ceased in this country where "[t]hroughout our history differences in race and color have defined easily indentifiable groups which have at times required the aid of the courts in securing equal treatment under the laws."[66] "It is the poor, the illiterate, the underprivileged, the member of the minority group who is usually sacrificed by society's lack of concern."[67] To believe that this discrimination can be ended or controlled by the annulment of forthright jury discretion in capital sentencing in North Carolina blinks reality. For,

> "discretion in the imposition of the death penalty will continue to be exercised in the prosecuting attorney's decision concerning the wording of the charge; the grand jury's decision concerning the

[65]PIERREPOINT, EXECUTIONER: PIERREPOINT 211 (1974):

> "As long as reprieves for the death sentence existed, the reason for a reprieve was always fundamentally political: an execution here would incite too much sympathy for the victim and must be respited; an execution there will show that the Home Secretary means business. The public were allowed to blow like the wind for one popular reprieve of a favourite from Hampstead, and stay dead calm about an unattractive strangling in Ashton-under-Lyne precisely because the same basic inconsistency was being operated for the policy reprieves. The trouble with the death sentence has always been that nobody wanted it for everybody, but everybody differed about who should get off."

[66]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

[67]DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). *See also* text and notes at notes 226-227, *infra*.

> allegations of the indictment; the jury's findings concerning the existence of defenses, [and] elements of the crime . . .; and the governor's decision whether to commute the death sentence if one results. Since discretion will not be substantially restricted under the new [procedure] . . . , but merely shifted to other parts of the criminal justice process, there is little reason to expect that disproportionate application to minorities and poor people will not continue."[68]

A. Prosecutorial Charging Discretion

As long ago as 1931, the Wickersham Commission reported that "[t]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom. . . ."[69]

[68]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974). *See also* Note, *Mandatory Death: State v. Waddell*, 4 N.C. CENT. L. J. 292, 298 (1974).

[69]NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 19 (1931). *See also* DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1971); authorities collected in note 74 *infra*. *Cf.* MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929):

> ". . . I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts, partially through their own lack of capacity, partly through legal limitations upon their powers, and largely because they have no means for knowing what they should know about the cases before them, perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent, he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one."

In North Carolina, the prosecuting attorney (called the Solicitor) is charged with the duty to "prepare the trial dockets, [and] prosecute in the name of the State *all criminal actions requiring prosecution* in the superior and district courts of his district," N.C. Gen. Stat. § 7A-61 (1973 cum. supp.) (emphasis added). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions,[70] *State*

[70]A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under *Waddell*. In *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974), two persons were tried and convicted for murder during the course of an armed robbery. A third person, one Brailford, had helped to plan the robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." 204 S.E.2d at 647. The Court described Brailford's criminal role in the following fashion:

> "the State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated he expected his cut. . . .
>
> The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Ibid. The other two persons involved in the robbery, Spicer and one Isaac Monk, were convicted of first degree murder and sentenced to die. Spicer's conviction has been, as indicated, reversed on grounds permitting a retrial and a new death sentence, while Monk's conviction and death sentence are now pending on appeal in the North Carolina Supreme Court. *State v. Monk*, No. 13, New Hanover County, Fall Term, 1974.

v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953),[71] including not only absolute discretion whether and what to charge,[72] but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment even if the evidence

[71]The Court also ruled in *State v. Loesch*, that the Attorney General had no supervisory jurisdiction over the several Solicitors of the State, whose offices were established by Article III, Section 18 of the State Constitution. "[T]he duty of the Attorney General in so far as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties." 75 S.E.2d at 656.

[72]The grand jury provides no significant check upon prosecutorial discretion since – except in a few extraordinary cases – it is heavily dominated by the prosecuting attorney. *See, e.g.*, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1171 (1960), and authorities cited; Shannon, *The Grand Jury, True Tribunal of the People or Administrative Agency of the Prosecutor?* 2 NEW MEXICO L. REV. 141, 170 (1972); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 212-213 (1955). Indeed, it is dubious that even the most conscientious grand juror, zealous to perform the grand jury's function of providing "'a fair method for instituting criminal proceedings against persons believed to have committed crimes,'" *Costello v. United States*, 350 U.S. 359, 362 (1956) (as quoted in *Russell v. United States*, 369 U.S. 749, 761 (1962)); *accord: State v. Greer*, 238 N.C. 325, 77 S.E.2d 917, 918-919 (1953), by inquiring "into the existence of possible criminal conduct and [returning] . . . only well-founded indictments," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *see also United States v. Calandra*, 414 U.S. 338, 343 (1974), would suppose that this function called upon him to return an indictment upon charges *greater* than those sought by the prosecutor. And, as we shall shortly see under North Carolina law, if a grand jury did return such an indictment, the prosecutor could elect not to prosecute the offense charged, but only a lesser included offense. *See* text and note at note 73 *infra*.

shows that a greater crime has been committed, *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 455 (1971);[73] *and see State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951).[74]

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[73]In *State v. Allen*, the Court affirmed a second degree burglary conviction in a case where the sole question presented on appeal was " 'Did the trial court commit error by placing the defendant on trial for burglary in the second degree when all the evidence tended to show burglary in the first degree?' " 181 S.E.2d at 455. The appellant was charged by indictment with first degree burglary, but at trial the solicitor announced he would seek no verdict greater than burglary in the second degree. The Supreme Court of North Carolina ruled that "the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein.... The effect of such election by the solicitor, announced as in this instance, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses." *Ibid.*

[74]*Cf.* Note, *Prosecutorial Discretion*, 21 DePAUL L. REV. 485, 486 (1971-1972):

> "[t]he limitations of a prosecutor's discretion are somewhat nebulous, and, in general, undefined. He has the authority by law to enforce certain laws by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."

See also MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-172, 293-350 (1969); 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 315-320 (1956); Baker & DeLong, *The Prosecuting Attorney*, 24 J. CRIM. L. & CRIM. 1025 (1934); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957); Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L. F. 511; Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 209-215 (1955).

The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is *State v. Casey*, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The North Carolina Supreme Court rejected this contention, commenting that the appellant had no "privilege to be tried for the capital felony" and concluding that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And following *Waddell*, the court in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that the Eighth and the Fourteenth Amendments required any circumscription of the discretion of the Solicitor in capital cases:

> "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

The consequence of this unfettered prosecutorial discretion is, of course, that different Solicitors may utilize different standards in deciding whether to initiate capital or noncapital prosecutions. Without any guidance whatsoever,[75] a Solicitor is free to make the

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[75]*Cf.* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952):

> "[a] society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves."

decision whether an indictment will be sought for first or second degree murder or manslaughter,[76] for rape or assault with intent to rape, for first or second degree burglary. He may thus "without violating [his] . . . trust or any statutory policy . . . refuse to [seek] . . . the death penalty no matter what the circumstances of the crime." *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White). This unconstrained discretion doubtless accounts in considerable part for the striking fact that there have been only three convictions[77] of first degree burglary during a full year of *Waddell's* implementation in a State where there were about forty convictions annually for this crime in

[76]As we demonstrate at pp. 65-76 *infra*, the distinctions among these offenses as they may apply to particular factual situations are largely intangible and judgmental.

[77]*State v. Poole, rev'd for insufficient evidence*, 285 N.C. 108, 203 S.E.2d 786 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d10(1974), *petition for cert. filed sub nom. Henderson v. North Carolina*, U.S.S.C. No. 73-6853 (June 8, 1974); *State v. Boyd*, N.C. Sup. Ct. No. 7, Spring Term 1974, (pending on appeal). In *State v. Henderson, supra*, the defendant was also convicted of and sentenced to die for rape; and in *State v. Boyd, supra*, the jury was unable to agree on a homicide verdict after it was instructed that it could find the defendant guilty of second degree murder.

the recent past,[78] and where 39,210 "burglaries and housebreakings" were reported in 1972.[79] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary

[78]In 1955, the North Carolina Department of Justice ceased to report separate statistics for persons convicted of first degree burglary and of second degree burglary. In 1952, there were 47 convictions for first degree burglary in Superior Court (with 15 "Other dispositions") and 5 convictions in "inferior court" (with 64 "Other dispositions" there). 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 515, 521 (1954). In 1953, there were 33 convictions for first degree burglary in Superior Court (with 10 "Other dispositions") and 4 convictions in "inferior court" (with 49 "Other dispositions" there). *Ibid.* In 1954, there were 35 convictions for first degree burglary in Superior Court (with 26 "Other dispositions") and 9 convictions in "inferior court" (with 61 "Other dispositions" there). 33 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1954-1956 377, 379 (1956). "Other dispositions" is nowhere defined; since the total of convictions and "Other dispositions" represents "cases disposed of in the Superior and inferior courts of the State," 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 510 (1954), "Other dispositions" apparently includes acquittals and *nol pros's*.

[79]UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1972 74 (Aug. 1973). The Uniform Crime Reports, of course, reflect reported crimes, not convictions; and the reported "burglaries and housebreakings" doubtless exceed the total number of statutory first degree burglaries which occurred in the State during 1972. Nevertheless, it cannot rationally be imagined that only *three* first degree burglars were apprehended in North Carolina during a twelve month period.

prosecutions in cases where they might have obtained convictions for this crime.

The inconsequential number of first degree burglary convictions under the *Waddell* regime is hardly surprising, since the exercise of prosecutorial discretion to blunt the impact of "mandatory" penalties in sympathetic cases has been one of the most significant phenomena observed in the enforcement of such statutes: "[a] charge may be reduced to avoid infliction of punishment harm that administrative officials regard as too severe in relation to the suspect's conduct. Usually, a less serious offense is charged because conviction of the maximum offense carries a statutory mandatory minimum sentence."[80]

As with the death-penalty statutes struck down in *Furman*, it is not necessary to conclude that North Carolina's capital laws are being intentionally administered "with an evil eye and an unequal hand," *Yick Wo*

[80] MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 207 (1969). *Cf.* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 49 (1972):

> "[o]fficials tend to respond to the undue harshness of punishments provided by the law by seeking discretion to avoid the imposition of that harshness in most cases. Yet, ironically, it is when the system is particularly severe that discretion may be most abusive and the temptation to act unjustly becomes greater. When the system is severe, discretionary decision-making becomes unacceptable because it reposes excessive authority in the hands of an often unsupervised individual official. In such a situation, the advantages of legal rules and process become exaggerated."

v. Hopkins, 118 U.S. 356, 373-374 (1886). The point rather is that their implementation is necessarily and unavoidably *arbitrary*. Since no standards exist to regularize the exercise of prosecutorial discretion, there is nothing to guarantee that some defendants, like petitioner, will not be capitally charged while other defendants, probably guilty of similar conduct, are prosecuted for second degree murder or manslaughter. Although the choice of charge is quite literally the difference between life and death, that choice is a completely uncontrolled, discretionary decision of the Solicitor.

B. Plea Bargaining

Another point of entrance for arbitrariness in the administration of capital punishment in North Carolina under the *Waddell* procedures is the unfettered power of the Solicitor to accept a plea of guilty to a lesser or other non-capital offense from a capitally charged defendant, and/or to *nol pros* a capital indictment. Exercise of this discretionary power undercuts the "mandatory" nature of the death penalty for first degree murder as effectively as the practice of selectively charging homicide defendants with second degree murder or manslaughter at the outset. The guilty-plea process is unregulated by law, and the discretion of a Solicitor to accept a plea to a lesser offense in a capital case is therefore quite as untrammelled as the freedom of a jury to recommend mercy in a pre-*Waddell* capital prosecution.

[14b]

Plea bargaining is pervasive in the criminal justice system; guilty pleas are said to account for up to ninety per cent of all criminal convictions.[81] Indeed, in view of the judicial resources available, the systematic and extensive practice of plea bargaining appears inevitable:

> "[i]f all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted

[81] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). *See also* Coon, *The Indictment Process and Reduced Charges*, 40 N.Y. ST. BAR J. 434 (1968). A study of the indictments for first and second degree murder in Massachusetts between 1956 and 1965 which received a final disposition in terms of guilt or innocence revealed that 221 out of 326 defendants (67.8%) entered a guilty plea and that 93.2% of these guilty pleas were to a lesser charge. Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFF. L. REV. 292, 299 (1969). The study concluded that:

> "there is a wide disparity among the courts in terms of the proportion of guilty pleas in murder cases. This finding indicates that the practice of plea bargaining is far from uniform. It also underscores the potential risk inherent in such an informal and invisible process as plea bargaining. For example, a defendant indicted for first degree murder in one court may have a very good chance of negotiating a plea of guilty to second degree murder, while in another court such a possibility may be minimal. The implications of this are serious, since conviction for first degree murder may well result in a sentence of death. . . . Therefore, it seems crucial that the practice of plea bargaining be governed by specific and explicit guidelines that could be systematically and consistently applied from court to court."

Id. at 307.

> could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him . . . . The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty."[82]

Because homicide cases are likely to take up a great deal of time in preparation and trial, they are particularly likely to be settled by plea bargaining.[83] And the fact that the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error provides an additional incentive for plea bargaining in capital cases:

> " '[s]ince time immemorial . . . [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a murder trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an Appellate Court.' "[84]

[82] LUMMUS, THE TRIAL JUDGE 46 (1937).

[83] In the words of one prosecutor:

> " 'A murder case ties up a courtroom for a week, or at least for three days. We are naturally more anxious to bargain for guilty pleas in murder cases than we are in cases that might take fifteen minutes at trial.' "

Pittsburgh First Assistant District Attorney James G. Dunn, quoted in Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

[84] Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, *State v. Faison*, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

Plea bargaining almost inevitably involves a reduction in charge or sentence: "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process."[85] This Court is not unfamiliar with guilty pleas to lesser included offenses entered by North Carolina defendants charged with capital crimes, who thereby escaped possible death penalties. *North Carolina v. Alford*, 400 U.S. 25 (1970);[86] *Parker v. North Carolina*, 397 U.S. 790 (1970). Such cases are a commonplace of "capital" justice. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973). Indeed, the prosecutor's attitude toward plea-bargaining in the case of a death-charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[87] That attitude in turn reflects fundamentally the prosecutor's choice to insist upon or to remit the punishment of death. For his willingness to offer or accept a lesser plea (and how much lesser) responds not

[85]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

[86]In *North Carolina v. Alford*, the Court noted that "the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired." 400 U.S. at 37.

[87]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

merely to his estimate of trial costs and contingencies but also to his wholly discretionary judgment – sometimes reasoned, sometimes "gut," sometimes principled and independent, sometimes politically opportunistic, but always selective and subject to the influence of factors which remain "demeaningly trivial compared to the stakes"[88] – as to whether the particular offense or offender *deserves* capital punishment.[89]

Furthermore, an ostensibly "mandatory" death penalty statute is especially likely to result in the selective allowance of guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences."[90] The negotiated

[88]This phrase was used by the late Professor Harry Kalven, Jr., and by Hans Zeisel to describe the factors affecting capital sentencing by juries before *Furman*. KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966). It is equally apt to describe the factors influencing the prosecutor's plea-bargaining discretion after *Furman* and *Waddell*.

[89]*See* BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 41-44 (1974). *Cf.* note 91 *infra*.

[90]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 102 (1966). *Cf.* Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW No. 5, 25, 31-32 (1961):

> "[t]hese plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently too tough . . . . The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations."

plea is "the means by which . . . [a prosecutor] can avoid the unacceptably rigorous application of the letter of the law."[91] Prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes."[92]

It is clear that a great many capitally charged defendants in North Carolina have been allowed to plead guilty to lesser offenses and thus to escape the threat of a death penalty.[93] In other cases, however,

[91] Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 25 (1972). *See also* Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case – A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. No. 7, 44, 53 (1961):

> "[i]n many cases we believe we mitigate the harshness of the letter of the law by taking a guilty plea. We make such decisions only after much careful thought and I think we make them in a way that the community generally approves."

[92] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966). *See also* 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 319 (1956); Coon, *The Indictment Process and Reduced Charges*, N.Y. ST. BAR J. 434, 438 (1968).

[93] *See, e.g.*, the following 17 cases: *State v. Hamlin*, Wake County Super. Ct. No. 74-Cr-11895 (April 1, 1974, indictment for first degree murder; April 12, 1974, guilty plea to second degree murder, sentence of 15-20 years); *State v. Leroy Johnson*, Wake County Super. Ct. No. 74-Cr-7160 (February 25, 1974, indictment for first degree murder; March 8, 1974, guilty plea to second degree murder, sentence of 10 years); *State v. Harris*, Wake County Super. Ct. No. 73-Cr-76418 (February 11, 1974,

(continued)

solicitors have wanted and achieved nothing less than a

(footnote continued from preceding page)

indictment for rape; August 19, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Santor*, Wake County Super. Ct. No. 73-Cr-68725 (February 11, 1974, indictment for first degree murder; July 15, 1974, guilty plea to voluntary manslaughter, sentence of 20 years); *State v. Lacy Jones*, Wake County Super. Ct. No. 73-Cr-698 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Kenneth Jones*, Wake County Super. Ct. No. 74-Cr-697 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault with intent to inflict serious injury, sentence of 1 year); *State v. Chance*, Wake County Super. Ct. No. 74-Cr-696 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Goldston*, Wake County Super. Ct. No. 73-Cr-73020 (January 7, 1974, indictment for first degree murder; May 24, 1974, guilty plea to voluntary manslaughter, sentence of 7 to 10 years); *State v. Smith*, Wake County Super. Ct. No. 73-Cr-54092 (October 29, 1973, indictment for first degree burglary; February 25, 1974, guilty plea to breaking and entering with intent to commit larceny, sentence of 7-10 years suspended with probation); *State v. Otha Johnson*, Wake County Super. Ct. No. 73-Cr-44188 (August 30, 1973, indictment for first degree murder; April 22, 1974, guilty plea to voluntary manslaughter, sentence of 14-18 years); *State v. Wright*, Wake County Super. Ct. No. 73-Cr-41760 (August 30, 1973, indictment for rape; November 7, 1974, guilty plea to assault on a female, sentence of time served); *State v. Weatherspoon*, Wake County Super. Ct. No. 73-Cr-28571 (August 30, 1973, indictment for first degree burglary; October 12, 1973, guilty plea to felonious breaking and entering, sentence of 1-2 years); *State v. Ramos*, Wake County Super. Ct. No. 73-Cr-30623 (May 29, 1973, indictment for first degree burglary; June 4, 1973, guilty plea to non-felonious breaking and entering, sentence of 2 years suspended with 5 years probation); *State v. DeBoise*, Wake

(continued)

[17b]

capital conviction and sentence.

Plea bargaining under a "mandatory" statute is frequently said to "provide the opportunity to individualize justice .... Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[94] The result of this process, however, is thoroughly to vitiate the uniform operation of the statute:

(footnote continued from proceeding page)

County Super. Ct. No. 73-Cr-29233 (May 29, 1973, indictment for first degree burglary; October 22, 1973, guilty plea to felonious breaking and entering, sentence of 4 years suspended with probation); *State v. Stephenson*, Wake County Super. Ct. No. 73-Cr-27254 (May 29, 1973, indictment for rape; April 29, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. Ct. No 73-Cr-20787 (April 24, 1973, indictment for rape; April 18, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. St. No. 73-Cr-15922 (April 9, 1973, indictment for first degree murder; November 26, 1973, guilty plea to voluntary manslaughter, sentence of 20 years). These cases, terminated by a guilty plea to a non-capital offense, were initiated by capital indictments returned in one of North Carolina's one hundred counties (Wake), the county in which petitioner was indicted, for offenses allegedly committed during the January 18, 1973 – April 8, 1974 period when the capital procedures mandated by *State v. Waddell* were in effect.

[94]Heath, *Plea Bargaining – Justice Off the Record*, 9 WASHBURN U. L. REV. 430, 455 (1970). *See also* NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 98 (1966):

> "[c]harge reduction offers the court an opportunity to individualize justice by distinguishing between technically similar cases in both sentence and conviction label, especially when sentencing discretion is denied by legislatively fixed terms."

> "[i]n both Michigan and Kansas, where mandatory sentences for particular crimes are common, plea negotiation not only is a widespread practice considered necessary to obtain guilty pleas but is generally accepted by both prosecution and the trial courts as desirable in situations where charge reduction is necessary to avoid overly severe sentences."[95]

Such a practice – by which some defendants indicted for capital offenses are permitted to escape with sentences less harsh than death as the result of plea negotiations conducted in the unlimited discretion of the prosecutor – may be thought necessary and proper, and it is doubtless inevitable, to achieve "individualized" and "humane" justice under the exceedingly broad range of death penalties made "mandatory" in North Carolina by *Waddell*. But in the very process of "ameliorating the severity of the more extreme punishment," *United States v. Jackson*, 390 U.S. 570, 582 (1968), it reintroduces exactly the kind of arbitrary selectivity condemned in *Furman*.[96]

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[95]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 41 (1966).

> "A major characteristic of criminal justice administration particularly in jurisdictions characterized by legislatively fixed sentences, is charge reduction to elicit a plea of guilty."

Id. at 76.

[96]Although properly supervised plea bargaining may not violate Due Process, *see Brady v. United States*, 397 U.S. 742, 750-755 (1970), the result of plea bargaining practices may nevertheless render the administration of a capital punishment statute invalid under *Furman v. Georgia*. This is so for the same reason that the approval of standardless jury sentencing under the Due Process Clause in *McGautha v. California*, 402 U.S. 183 (1971), did not imply (as the subsequent *Furman* decision made clear) that the *results* of such a procedure complied with the Eighth Amendment.

C. Jury Discretion

Despite the annulment of explicit sentencing discretion following a first degree murder conviction, a North Carolina jury still has broad license to spare the life of a capital defendant. It may do so by convicting him of a lesser homicide offense, an attempt or an assault, or by recognizing some amorphously defined defense as a justification or mitigation of the offense, as well as by acquitting him altogether in the teeth of the evidence. Although this jury discretion is less straightforward than under North Carolina's pre-*Waddell* capital procedure, it is equally selective, and its greater diffusion merely injects greater arbitrariness into the disposition of capital offenders at the trial stage.

North Carolina General Statutes § 15-170 (repl. vol. 1969) provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . ."

Petitioner's jury was charged on manslaughter, second degree murder, and first degree murder (A. 69-84), thereby giving it a *de facto* sentencing power to impose any punishment from a term of four months imprisonment (N.C. Gen. Stat. § 14-18 (repl. vol. 1969)) to a "mandatory" death penalty (N.C. Gen. Stat. § 14-17 (repl. vol. 1969)). The instructions given to this jury are representative of those utilized in most cases where a defendant is charged with "premeditated and deliberated" first degree murder; and a charge on lesser included offenses is not infrequently given even in cases of first degree murder allegedly committed during a felony, *see State v. Knight*, 248 N.C. 384, 103 S.E.2d

452 (1958), or by poisoning, *see State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906). For not only is it the rule that a defendant may demand a lesser-included-offense instruction as a matter of right whenever *any* evidence could conceivably support a lesser conviction,[97] but – as we shall see below[98] – no effective restraint is imposed upon the trial judge's submission of lessers to the jury in the absence of any such evidence.

[97] "If . . . there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." *State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958) (quoting *State v. Spivey*, 151 N.C. 676, 65 S.E. 995, 999 (1909)); *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42, 44 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, *State v. Griffin*, 280 N.C. 142, 185 S.E.2d 149, 151 (1971); *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 397 (1971); *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289, 294 (1971); *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); *State v. Cox*, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime, *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916, 921 (1955); *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494, 496 (1945); *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466, 467-468 (1934); *State v. Chavis*, 80 N.C. 353, 357-358 (1879). However, if a lesser-included offense charge is given in such a situation, and if a defendant is convicted of the lesser without evidentiary support, the conviction will nevertheless be affirmed on appeal. *See State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), discussed in text at p. 78 *infra*.

[98] *See* text and notes at notes 117-119 *infra*.

The Supreme Court of North Carolina has frequently reversed convictions for capital first degree murder[99] because the trial court failed to give a charge on second degree murder,[100] voluntary manslaughter,[101] or involuntary manslaughter.[102] Indeed, the right to a lesser-included-offense charge is considered so important in

[99]The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

[100]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452 (1958); *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946); *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). When the State attempts to prove "willful, deliberate and premeditated killing," N.C. Gen. Stat. §14-17 (repl. vol. 1969), which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. §15-172 (repl. vol. 1969), and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965). *Cf. State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341-343 (1965); *State v. Drake*, 8 N.C. App. 214, 174 S.E.2d 132, 135 (1970).

[101]*State v. Manning*, 251 N.C. 1, 110 S.E.2d 474 (1959); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916). *Cf. State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

[102]*State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). *Cf. State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

North Carolina that its omission is held to be reversible error even when the defendant fails to request it. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970); *State v. Wagoner*, 249 N.C. 637, 107 S.E.2d 83 (1959). *See State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). Trial judges are therefore advised to err on the side of inclusion; and, once lesser-offense instructions on second degree murder and manslaughter are included in a first degree murder trial, the jury is given essentially unrestricted discretion to convict alternatively for any of the three crimes. The definitions of the respective offenses under North Carolina law do not distinguish them except in terms of vague, intangible and elusive elements that remain as intractable to objective fact-finding as they are inviting to "any amount of purely 'discretionary' decision."[103]

North Carolina General Statutes §14-17 (repl. vol. 1969) defines as murder in the first degree any

> "murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony."

It then declares second degree murder to be "[a]ll

[103]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974).

other kinds of murder."[104] Thus, in a case like petitioner's, "[m]urder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 657 (1969). *See also State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 771-773 (1961); *State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 892 (1963). *See also State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 337 (1969); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942).[105] Manslaughter is not defined by statute[106] but has been declared judicially to be "the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Kea*, 256 N.C.

[104]The crime of murder was divided into two degrees in 1893. *See* N.C. Acts 1893, ch. 85. Since this date, the common law definition of murder as an unlawful and malicious killing has been applicable only to second degree murder; and to constitute statutory first degree murder, "the killing must be 'wilful, deliberate, and premeditated.'" *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128, 129 (1899). Before 1893, "[a]ny unlawful killing of a human being with malice aforethought, express or implied, was murder and was punishable by death." *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 803 (1970).

[105]"Murder in the first degree is sometimes defined as murder in the second degree plus premeditation," *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 804 (1970).

[106]North Carolina General Statutes §14-18 (repl. vol. 1969) merely provides that the punishment for "manslaughter" shall be imprisonment "for not less than four months nor more than twenty years."

492, 124 S.E.2d 174, 175 (1962). *See also State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910).

The constituent elements that mark the lines between first and second degree murder and manslaughter are extraordinarily hazy and amorphous. "The crime of murder in the first degree is distinguished by a mental process or psychological condition none [too] . . . easy of expression." *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942). Indeed, the North Carolina Supreme Court has declared that the reason for the statutory division of murder into two degrees in 1893 was to "select . . . out of all murders denounced by the common law those deemed more heinous on account of the mode of their perpetration." *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649, 652 (1949). *See also State v. Cole*, 132 N.C. 1069, 44 S.E. 391, 393 (1903).

> "The passage of the Act of 1893 marks an era in the judicial history of the state. As far as we can ascertain, every other state had previously divided the common-law kind of murder into two classes. The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts one who is provoked by insulting words (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. So long as artificial proof of malice is allowed to raise the presumption of murder, this new law will fail to accomplish the object for which it was framed . . . . It is not the severity of

laws, but the certainty of their execution, that accomplishes the end that should be always in view in enforcing them. Heretofore public opinion has approved, and often applauded, the conduct of juries in disregarding the instructions of judges as to the technical weight to be given to the use of a deadly weapon. The consequence has been that, a lax administration of the law being tolerated in such cases, other juries have constituted themselves judges of the law as well as of the facts, when proof has shown a more heinous offense. The experience of a few years will probably demonstrate here, as elsewhere, that fewer criminals will escape under a law which is in accord with the public sense of justice than under one which makes no discrimination between offenses differing widely in the degree of moral turpitude exhibited."

State v. Fuller, 114 N.C. 885, 19 S.E. 797, 802 (1894).[107]

[107] *Cf. State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896) (emphasis in original):

"the act of 1893 says in express terms that the jury before whom the case is tried shall determine the degree of murder. And we do not understand this to mean an unbridled, arbitrary, or mob finding, any more than it was before the statute. Even before the act of 1893 we all know that it was within the *power* of the jury to acquit and turn loose a prisoner, no matter how guilty he might be, and the court was powerless. In fact, it is alleged that they often did this. But is is expected they will find the facts, and apply them to the law given by the court, determine whether the prisoner is guilty or not, and, if guilty, in what degree. We see no reason why they should act differently now to what they did before the statute, and we do not believe they are any more disposed to take the law in their own hands in deciding cases under the act of 1893 than they were before."

First degree murder is defined broadly, though vaguely:

"'[m]alice aforethought' was a term used in defining murder prior to the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade .... As used in ... G.S. § 14-17, the term 'premeditation and deliberation' is more comprehensive and embraces all that is meant by 'aforethought', and more."

State v. Hightower, 226 N.C. 62, 36 S.E.2d 649, 650 (1946).[108] The difference between first and second degree murder turns on the presence or absence of "premeditation" and "deliberation":

"[p]remeditation means 'thought beforehand for some length of time, however short.'

....

'Deliberation means that the act is done in [a] cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill,[109] executed by the defendant in a cool state of blood, in

[108] *See also State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942):

"[a]s pointed out by the Attorney General, 'aforethought is defined as "premeditated" (Century, Webster), and "premeditated" is defined as "deliberate."'"

[109] The intention to kill which is required for first degree murder, *see, e.g., State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858, 861 (1969); *State v. Stitt*, 146 N.C. 643, 61 S.E. 566, 567 (1908), is sometimes said to be merely an element of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567 (1968); *cf. State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322, 324 (1955).

furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' "

State v. Reams, 277 N.C. 391, 178 S.E.2d 65, 71 (1970) (quoting *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922)). *See also State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674, 683 (1972); *State v. Benson*, *supra*. " 'No fixed length of time is required for the mental processes of premeditation and deliberation . . . and it is sufficient if these processes occur prior to, and not simultaneously with, the killing,' " *State v. Perry*, 276 N.C. 339, 172 S.E.2d 541, 547 (1970) (quoting 4 STRONG, NORTH CAROLINA INDEX 196 (2d ed. 1958)). The determination whether "premeditation" and "deliberation" exist is necessarily given over almost entirely to the intuition of the jury[110] because these elements "are not usually susceptible of direct proof, and are therefore susceptible of proof by

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"The line which separates felonious homicides committed . . . without premeditation, from those accompanied by the additional mental condition called 'premeditation,' is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term, and submit the question of its existence to the jury. It is well settled that the state of mind, intent, sanity, etc., is always a question of fact for the jury."

State v. Daniels, 134 N.C. 671, 46 S.E. 991, 993 (1904). *See also* note 111 *infra*.

circumstances from which the facts sought to be proved may be inferred." *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484, 490 (1969).

"Malice," the factor that separates murder from manslaughter, is equally a matter of inference — and often of inference (or presumption) from the same basic facts that might support the jury's inference of premeditation and deliberation.[111]

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111 *See, e.g., State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398-399 (1971) (alternative ground), and cases cited.

For example, the North Carolina cases say that malice is "implied" (*see State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922), quoted in text pp. 72-74 *infra; and see, e.g., State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 421 (1910); *State v. McDowell*, 145 N.C. 563, 59 S.E. 690, 692 (1907)) or "presumed" (*see State v. Sparks*, ____ N.C. ____, 207 S.E.2d 712, 719 (1974); *State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341 (1965)) whenever the defendant's intentional discharge of a deadly weapon results in death. This principle plainly involves an evidentiary presumption that throws upon the defendant the burden of proving (either through the presentation of evidence or through the appearance of mitigating circumstances in the State's case, *e.g., State v. Vann*, 162 N.C. 534, 77 S.E. 295, 298 (1913)) that a killing with a firearm was non-malicious. *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943), and cases cited. Whether it also means that the prosecution is always entitled to a second degree murder submission in a case where the defendant is armed with a firearm is unclear. *State v. Downey*, 253 N.C. 348, 117 S.E.2d 39, 43 (1960), implies this conclusion, although earlier cases suggest the contrary. *See State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910); *State v. Miller*, 112 N.C. 878, 17 S.E. 167, 168-169 (1893).

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"Malice is not only hatred, ill will or spite, as it is

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Since *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894), the North Carolina Supreme Court has consistently iterated the rule that premeditation and deliberation – unlike malice– are *not* "presumed" from an intentional discharge of a deadly weapon resulting in death. *E.g., State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). As expressed in *Fuller*, this doctrine seemed to forbid a permissive inference, as well as a presumption, of premeditation and deliberation. However, later expressions of the *Fuller* rule speak only of the impropriety of a "presumption," *see e.g., State v. Reams, supra*, 178 S.E.2d at 71; *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 772 (1961); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188, 190 (1950); *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 33 (1938); *State v. Miller*, 197 N.C. 445, 149 S.E. 590, 592 (1929); *cf. State v. Booker*, 123 N.C. 713, 31 S.E. 376, 380 (1898), and of the shift of the burden of proof which a true presumption implies, *cf. State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 566-568 (1968). Collateral doctrinal developments have undercut the notion that an *inference* of premeditation and deliberation may not be drawn from intentional use of a deadly weapon: "[p]remeditation and deliberation are not usually susceptible to direct proof but must be established from the circumstances surrounding the homicide." *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487, 499 (1970), *rev'd on other grounds*, 403 U.S. 948 (1971); *see also State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974); *State v. Evans*, 198 N.C. 82, 150 S.E. 678, 679-680 (1929); *State v. Hamilton*, 19 N.C. App. 436, 199 S.E.2d 159, 160 (1973). The jury is to determine premeditation and deliberation from "'all the attendant circumstances'" under which the homicide is committed, *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 34 (1938), including "the manner of the killing, [the defendant's] ... acts and conduct attending its commission," *State v. Robertson*, 166 N.C. 356, 81 S.E. 689, 692 (1914); any "vicious and brutal circumstances," *State v. Duboise*, 279 N.C. 73, 181

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ordinarily understood – to be sure that is malice

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S.E.2d 393, 399 (1971); and the "use of grossly excessive force," *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974) (quoting *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539, 545 (1973)). "[P]remeditation and deliberation may be inferred from a vicious and brutal slaying of a human being." *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). Thus, it is no surprise that the North Carolina Supreme Court has abandoned its early occasional practice of reversing first degree murder convictions (*see State v. Cole*, 132 N.C. 1069, 44 S.E. 391 (1903); *State v. Bishop*, 131 N.C. 733, 42 S.E. 836 (1902) (alternative ground); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Thomas* 118 N.C. 1113, 24 S.E. 431 (1896) (alternative ground)) for insufficiency of evidence of premeditation and deliberation. Not since 1903 has a North Carolina appellate court held evidence insufficient to permit a finding of premeditation and deliberation, and therefore to support a first degree murder conviction – even though reversals for insufficient evidence of matters such as identity are common, *e.g., State v. Poole*, 285 N.W. 108, 203 S.E.2d 786 (1974) (capital burglary); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971) (second degree murder). Numerous cases sustain first degree murder verdicts where virtually nothing more than an unprovoked killing with a deadly weapon was established by the prosecution. *See, e.g., State v. Perry*, 276 N.C. 339, 172 S.E.2d 541 (1970); *State v. Old*, 272 N.C. 42, 157 S.E.2d 651 (1967); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950); *State v. Matheson*, 225 N.C. 109, 33 S.E.2d 590 (1945); *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439 (1939); *State v. Walker*, 173 N.C. 780, 92 S.E. 327 (1917); *State v. Ferguson*, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

The upshot, then, is that, in all but perhaps the rarest case of a killing by a defendant armed with a deadly weapon, no judicial control is exercised over the power of the jury to convict of any offense from manslaughter through first degree murder. The jury may or may not infer premeditation and deliberation from the same evidence which gives rise to the presumption of malice; and it may or may not find that presumption overcome to its "satisfaction" (*see* pp. 82-83 *infra*) by evidence of mitigation.

> -- but it also means that condition of mind which prompts a person to take the life of another without just cause, excuse or justification . . . . It may be shown by evidence of hatred, ill will, or dislike, and it is implied in law from the killing with a deadly weapon. . . ."

State v. Benson, 183 N.C. 795, 111 S.E. 869, 871 (1922).[112] *See also State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 893 (1963); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910); *State v. Tilley*, 18 N.C. App. 300, 196 S.E.2d 816, 818 (1973).

[112]Proof of a fight between the decedent and the defendant or threats uttered by the decedent to the defendant is often sufficient to negate the inference of malice. *See, e.g.*, the following cases in which defendant was convicted of manslaughter: *State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 70-72 (1967); *State v. Camp*, 266 N.C. 626, 146 S.E.2d 643, 644-645 (1966); *State v. Suddreth*, 230 N.C. 239, 52 S.E.2d 924, 925 (1949); *State v. Church*, 229 N.C. 718, 51 S.E.2d 345, 346 (1949); *State v. Beacham*, 220 N.C. 531, 17 S.E.2d 674, 675 (1941); *State v. Bright*, 215 N.C. 537, 2 S.E.2d 541, 542 (1939); *State v. Reynolds*, 212 N.C. 37, 192 S.E. 871, 871 (1937); *State v. Baldwin*, 184 N.C. 789, 114 S.E. 837, 838 (1922); *State v. Yates*, 155 N.C. 450, 71 S.E. 317, 317-318 (1911). However, a verdict of second degree murder is often affirmed in cases arising out of similar factual circumstances. *See, e.g.*, the following cases in which defendant was convicted of second degree murder; *State v. Cole*, 280 N.C. 398, 185 S.E.2d 833, 833-834 (1972); *State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89, 89-90 (1967); *State v. Barber*, 270 N.C. 222, 154 S.E.2d 104, 105-107 (1967); *State v. Morgan*, 245 N.C. 215, 95 S.E.2d 507, 507-508 (1956); *State v. Wingler*, 238 N.C. 485, 78 S.E.2d 303, 305-306 (1953); *State v. Russell*, 233 N.C. 487, 64 S.E.2d 579, 580 (1951); *State v. Taylor*, 226 N.C. 286, 37 S.E.2d 901, 901-902 (1946); *State v. Brinkley*, 183 N.C. 720, 110 S.E. 783, 785-786 (1922); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706, 706-707 (1899); *State v. Rummage*, 19 N.C. App. 239, 193 S.E.2d 475 (1972).

Definitions of this kind allow a jury almost complete freedom to return a capital or non-capital verdict not only upon the same evidence but upon the same factual interpretation of the evidence, finding or declining to find "premeditation," "deliberation" or "malice" in accordance with the desired sentencing consequences. To recognize this obvious truth is not to impugn the fidelity of jurors to their oaths but only to acknowledge that they are human. *See Jackson v. Denno*, 378 U.S. 368, 388-389 (1964). Legal formulations spelling the difference between life and death in terms that are "refractory to the best-instructed human understanding"[113] do not merely permit – they imperatively require – the exercise of non-objective, non-factual, discretionary judgments and "the play of . . . prejudices."[114] "[I]n a great many close cases, no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter."[115] Long ago, Justice (then Chief Judge) Cardozo recognized that the obscure distinctions between capital and non-capital grades of homicide – in particular, the concept of premeditation and deliber-

[113]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299 (1971).

[114]*Furman v. Georgia*, *supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas).

[115]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

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ation – amounted largely to an indirect "dispensing power" of mercy:

> "... the distinction [between first and second degree murder] is much too vague to be continued in our law .... [t]he statute is framed along the lines of a defective and unreal psychology.... What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."[116]

[116]CARDOZO, LAW AND LITERATURE 99-101 (1931). To speak of a "dispensing power," of course, is to describe only the benign half of what juries do when they "answer 'yes' or 'no' to the question whether this defendant was fit to live," *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). A "yes" answer, "like the decision of the prosecutor to accept a plea of guilty in the plea-bargaining process, sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did *not* find him guilty of a lesser offense rather than of the capital charge. And if the jury's *milder* verdict may be a function of its sympathies, then its *stormer* verdict, by inevitable logic, may be a function of its *lack* of sympathy." BLACK, CAPITAL PUNISHMENT, THE INEVITA-

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We have already seen that the "privilege" described by Justice Cardozo "to find the lesser degree" must be afforded to the jury under North Carolina law when there is "any evidence, or ... any inference ... therefrom"[117] of an unpremeditated or a non-malicious killing, within the vague contours of those unilluminating terms. But even that is not the whole story of the trial judge's or the jury's discretion in regard to lessers. For in North Carolina, a jury may also be charged on a lesser included offense where there is *no* evidence to

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BILITY OF CAPRICE AND MISTAKE 47 (1974) (emphasis in original).

Although it seems superfluous to make this point after *Furman*, we may note that the oft-quoted passage in *Witherspoon v. Illinois, supra*, regarding the jury's function in maintaining "a link between contemporary community values and the penal system," 391 U.S. at 519 n.15, did not state or imply the propriety of a system under which different juries decided whether different defendants were fit to live or die according to the particular reflection of community values fortuitously mirrored by the particular jury. The *Witherspoon* passage rather carefully states that, *where a legislature has left the life-or-death sentencing choice to be made by juries without any guiding principles, preferences or standards*, the juries' function is to reflect community attitudes regarding the death penalty – with the consequence that the reflection may not be distorted by improper jury-selection practices. The "where" clause in this analysis is a description of Illinois law (not challenged in *Witherspoon*): it is not a prescription for desirable or constitutional jury performance.

[117]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958), quoted more fully in note 97 *supra*.

support such a charge, and a conviction for the lesser offense will be sustained on appeal.[118] *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970); *State v. Robertson*, 210 N.C. 266, 186 S.E. 247 (1936); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917). In *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In *State v. Quick*, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "[s]uppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him."[119]

[118] The Supreme Court of North Carolina has occasionally disapproved of this practice, *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

In *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "[i]f we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

The jury has the further statutory power in felony cases to find a defendant guilty of either an attempt to commit the crime charged in the indictment or an assault with intent to commit that crime. North Carolina General Statutes § 15-170 (repl. vol. 1969) provides:

[119] "An error on the side of mercy is not reversible . . . ." *State v. Fowler*, 151 N.C. 731, 66 S.E. 567, 567 (1909). *Accord: State v. Rowe*, 155 N.C. 436, 71 S.E. 332, 337 (1911). *See also State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 466 (1969); *State v. Johnson*, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); *State v. Hall*, 214 N.C. 639, 200 S.E. 375, 377 (1939); *State v. Ratliff*, 199 N.C. 9, 153 S.E. 605, 606 (1930).

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

And N.C. Gen. Stat. § 15-169 (repl. vol. 1969) provides that:

> "[o]n the trial of any person for . . . any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

Failure of the trial court to instruct the jury on attempt or assault may be reversible error. *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923).[120]

Additional avenues for avoidance of a "mandatory" death penalty for first degree murder are provided by the power of North Carolina juries to allow a variety of indefinitely defined defenses, justifications and mitigations to the capital charge. These include the complete defenses of self-defense (or defense of others), *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 829 (1938), and insanity, *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969); provocation and passion, *State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916); *State v. Johnson*, 23 N.C. 354, 359, 362 (1840); and "imperfect" self-defense, *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836 (1922), which serve to reduce murder to manslaughter – doctrines of particular significance because "every practitioner, who has had any experience in the trial of capital cases, knows how prone juries are to compromise a capital case upon the middle ground of manslaughter," *State v. Brittain*, 89 N.C. 481, 501 (1883); and intoxication, which may avert at least a conviction of murder in the first degree, *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439, 446-447 (1939). Each of these doctrines involves an "affirmative" defense which the jury may or may not choose to accept upon the evidence urged by the defendant to support it; each requires largely subjective judgments by jurors in the application of principles of the greatest vagueness and imprecision;[121] and the

[120] *See also State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 53-54 (1957); *State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951); *State v. Webb*, 20 N.C. App. 199, 200 S.E.2d 840, 841 (1973). *Cf. State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (dissenting opinion of Mr. Chief Justice Bobbitt). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." *State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

[121] The contours of each North Carolina doctrine mentioned above are described in the following paragraphs, with the exception of insanity. Concerning the implications of the insanity defense as a means of avoiding capital punishment, see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 50-55 (1974). North Carolina employs the traditional M'Naghten test of legal insanity, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, 518-519 (1973), whose amorphousness is notorious, *see, e.g.*, GOLDSTEIN, THE INSANITY DEFENSE 44-66 (1967). And two ancillary North Carolina doctrines effectively consign the insanity defense to the complete discretion of the jury. First, the quantum of evidence suggesting mental abnormality which is ordinarily necessary to raise the issue for the jury's consideration is extremely small, *cf. State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 237 (1943), except, perhaps, where the nature of the testimony is not directed to the M'Naghten issue, *see State v. Helms*, 284 N.C. 508, 201 S.E.2d 850, 852-853 (1974). Second, the burden of proof upon the issue is the "satisfaction of the jury" test (*see* pp. 82-83 *infra*), and "[t]he jury alone is the judge of its satisfaction." *State v. Harris, supra*, 28 S.E.2d at 237-238.

peculiar North Carolina burden of proof on these issues – evidence "sufficient to satisfy" the jury – explicitly invites the making of those judgments in a wholly discretionary, non-objective manner.

> "[The North Carolina] cases enunciate and reiterate the rule – established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868) – that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied."

State v. Freeman, 275 N.C. 662, 170 S.E.2d 461, 464 (1969) (emphasis in original).[122] "[T]he intensity of the

[122] *See also State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235, 242 (1972); *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 428 (1971); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 333 (1969); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943); *State v. Moores*, 222 N.C. 436, 23 S.E.2d 311, 312 (1942); *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *State v. Garland*, 90 N.C. 668, 674-675 (1884); *State v. Calloway*, 1 N.C. App. 150, 160 S.E.2d 501, 503 (1968); *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435, 437 (1972); *and see State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 833 (1903) (disapproving instructions that an affirmative defense must be established by the "greater proof" or "stronger proof").

proof required to 'satisfy the jury' . . . cannot be defined by the court as being 'less than,' 'the same as,' or 'more than' the greater weight of the evidence or the preponderance of the evidence," STANSBURY, NORTH CAROLINA EVIDENCE § 214 (2d ed. 1963), because "the jury alone is the judge" of what satisfies it, *State v. Prince*, 223 N.C. 392, 265. E.2d 875, 876 (1943). Therefore, the " 'accepted formula *and the one that should be used if risk of error is to be avoided*, is that the defendant has the burden of proving his defense (or mitigation) "to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – but simply to the satisfaction of the jury." ' " *State v. Freeman, supra*, 170 S.E.2d at 464 (quoting STANSBURY, *op. cit. supra* (emphasis in opinion)).

The elements of which the jury must be thus "satisfied" are characteristically impressionistic. In assessing petitioner's claim of self-defense, for example, his trial jurors were called upon to decide whether, at the time of the incident with a man who had beaten him bloody that afternoon, petitioner had a "reasonable" apprehension of the necessity to kill in order to avoid suffering death or great bodily harm. *See State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750, 754 (1973); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 27 (1968); *State v. Johnson*, 270 N.C. 215, 154 S.E.2d 48, 52 (1967); *State v. Fowler*, 250 N.C. 595, 108 S.E.2d 892, 894 (1959); *State v. Bryant*, 213 N.C. 752, 197 S.E. 530, 533 (1938); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828 (1938). The application of this principle in the context of a case where the defendant seeks to prove that a prior fight with the decedent was

resumed just before the killing obviously presents peculiar difficulties. *See State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

> "[O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief."

State v. Marshall, 208 N.C. 127, 179 S.E. 427, 428 (1935).[123] *See, e.g., State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249, 253 (1971); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 159 (1965). However, the defendant must not have been the "aggressor," *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973) – a notion apparently involving concepts of relative "fault"[124] – and he must have "used no more force

[123] The *Marshall* case is frequently cited as the leading modern exposition of the law of self-defense in North Carolina. A more recent summary is found in *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 600-601 (1973). *See also State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450-453 (1970); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 26-29 (1968); *State v. Goode*, 249 N.C. 632, 107 S.E.2d 70, 71-72 (1959); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 832-835 (1903).

[124] The North Carolina cases abound with statements that, in order to prevail on a claim of self-defense, a defendant must have been "without fault" in provoking the assault against which he defends. *See, e.g., State v. Watkins* 283 N.C. 504, 196 S.E.2d 750, 755 (1973); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 429-431 (1971); *State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Johnson*, 278 N.C. 252, 179 S.E.2d 429, 432 (1971); *State v. Davis*, 225 N.C. 117, 33 S.E.2d 623, 624

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than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm," *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971). The use of "excessive force" defeats a claim of self-defense;[125] but one who uses excessive force may nevertheless prevail upon the partial defense of *imperfect* self-defense, which reduces murder – even by an intentional killing – to manslaughter, *State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221, 225 (1971);

(footnote continued from preceding page)

(1945); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828-830 (1938); *State v. Blevins*, 138 N.C. 668, 50 S.E. 763, 764 (1905). In *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916), the North Carolina Supreme Court refined the fault concept ("' a perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his actions,'" 87 S.E. at 514) by recognizing degrees of fault: if a defendant begins an affray with the intention of inflicting great bodily harm, his right of self-defense is lost and the killing is murder; but if he begins or provokes the affray with some lesser assault or verbal abuse, his right of self-defense is rendered "imperfect," *ibid.*, and he is guilty of manslaughter. The *Crisp* principle, turning the right of self-defense upon moral blame-worthiness, has deep roots in North Carolina law. *See, e.g., State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888).

[125] *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973). *See also, e.g., State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. McDonald*, 249 N.C. 419, 106 S.E.2d 477, 478 (1959); *State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832 (1938); *State v. Terrell*, 212 N.C. 145, 193 S.E. 161, 164 (1937); *State v. Marshall*, 208 N.C. 127, 179 S.E. 427, 428 (1935); *State v. Glenn*, 198 N.C. 79, 150 S.E. 663, 664 (1929); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910).

State v. Wynn, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617, 619 (1924); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910). *See also State v. Woods*, 278 N.C. 210, 179 S.E.2d 358, 363 (1971); *State v. Ramey*, 273 N.C. 325, 160 S.E.2d 56, 59 (1968). Moreover, one who kills under the impulse of an *unreasonable* fear of death or serious bodily harm may also claim imperfect self-defense, reducing murder to manslaughter. *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836-837 (1922);[126] *and see State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970).

Another partial defense that may result in a manslaughter verdict is provocation and passion. The North Carolina version of this doctrine is complex. Provocation alone (isolated from the passion that it may arouse) is held not to preclude malice but only to rebut the presumption of malice arising from an intentional killing with a deadly weapon. *State v.*

[126] In addition to the "excessive force" and "unreasonable fear" varieties of imperfect self-defense, North Carolina law recognizes other situations in which a killing may be nonmalicious, and hence merely manslaughter, because the defendant's use of deadly force was self-protective although not legally justifiable under the doctrines pertaining to self-defense. *See State v. Finch*, 177 N.C. 599, 99 S.E. 409, 414 (1919); *State v. Yarborough*, 8 N.C. 78, 85 (1820). One such situation is the permutation of the "aggressor" doctrine described in note 124 *supra*. Another is the situation in which the defendant fails to comply with the "safe-retreat" requirement for perfect self-defense. *See State v. Garland*, 138 N.C. 675, 50 S.E. 853, 854-855 (1905); *cf. State v. Johnson*, 23 N.C. 354, 364 (1840).

Johnson, 23 N.C. 354, 359 (1840). Passion aroused by provocation, on the other hand, is said to be legally exclusive of malice: "[i]n law they cannot co-exist." *Id.* at 362. The psychological explanation offered by the early cases is that passion renders an individual heedless of the dictate of reason not to kill. *See State v. Hill*, 20 N.C. 491, 496 (1839); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910). But even from the outset the doctrine has been seen as an "indulgence of the law," *State v. Hill, supra*, 20 N.C. at 496, "a condescension to the frailty of the human frame," *ibid.* "In mitigating the offence to manslaughter where death ensues upon a sudden rencounter of this sort, the law shews its indulgence to that frailty of human nature which urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other." *State v. Jarrott*, 23 N.C. 76, 85 (1840). *See also State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916). As might be expected of a moralistic conception of this nature, its rules are fine-spun and casuistic. The North Carolina Supreme Court has declared that "'"passion" means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection' . . . '"[P]assion is not limited to rage, anger, or resentment. It may be fear, terror, or, according to some decisions, "excitement" or "nervousness,"'" *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970). Passion must spring from provocation, *State v. Carter*, 76 N.C. 20, 22-23 (1877); "slight" provocation is insufficient, *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *see*

State v. Keaton, 206 N.C. 682, 175 S.E. 296, 298 (1934); the provoking conduct must in theory "amount to an actual or threatened assault," *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *see also State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832-833 (1938).[127] North Carolina appellate courts have managed to remain within these rules with only a little straining;[128] but trial courts and juries have ignored them entirely.[129] Passion is sometimes said to be synonymous with "heat of blood," *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); but then again it is said that "'cool state of blood' does not mean the absence of passion and emotion . . . ." *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974). The sum of the doctrine is to make murder or

[127]The provoking conduct need not, however, amount to a felonious assault, *State v. Will*, 18 N.C. 121, 169 (1834), and it need not have threatened the defendant's life, *State v. Sizemore*, 52 N.C. 206, 209 (1859).

[128]*See, e.g., State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910) (unlawful arrest by the victim who "shoved" the defendant held adequate provocation); *State v. Briggs*, 20 N.C. App. 368, 201 S.E.2d 580 (1974) (victim's actions of breaking defendant's car window and inserting the upper part of his body into the car held adequate provocation).

[129]*See, e.g., State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969) (victim threatened defendant, ran away, returned with his hand in his pocket; defendant who shot victim convicted of manslaughter); *State v. Phillips*, 262 N.C. 723, 138 S.E.2d 626 (1964) (victim opened door of car containing defendant and woman friend; defendant who shot victim convicted of manslaughter).

manslaughter liability depend essentially upon the jury's empathy with the defendant on trial:

> "reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

State v. Merrick, 171 N.C. 788, 88 S.E. 501, 503 (1916) (quoting *Maher v. People*, 10 Mich. 212, 220 (1862)).[130]

These several doctrines, of course, do not exhaust the non-capital options available to petitioner's jury. Jurors in his case or like cases, applying legal principles that leave the widest latitude for subjective judgment and the "natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion,"[131] might have returned verdicts ranging

[130]Provocation may also be held inadequate where the defendant's response is disproportionately severe. *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Curry*, 46 N.C. 280, 287 (1854). *Cf. State v. Gooch*, 94 N.C. 987, 1010 (1886).

[131]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46 (1974).

[32b]

from second degree murder[132] to acquittal,[133] in order

[132]Alcohol was implicated in petitioner's case (A. 14-15, 28-29, 52, 54), as it is in so many homicide cases. *See* WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 165-166, 323 (1966). Its involvement required consideration by the jury on the question of the premeditation and deliberation requisite for a capital, first degree murder conviction.

> "... [W]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. 'No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law.' State v. Murphy, 157 N.C. 614, 619, 72 S.E. 1075, 1077. '[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.'"

State v. Hamby, 275 N.C. 674, 174 S.E.2d 385, 387 (1970). *See also State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65, 69-70 (1972); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526, 532-533 (1970); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567-568 (1968); *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473, 474-475 (1965); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 321 (1942).

[133]Jury acquittals motivated solely to evade "mandatory" death sentences are an historical commonplace in the administration of "capital" justice. *See, e.g., State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra*; *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107, *supra*; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. Rev. 1099, 1102 n.18 (1953); Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 52 (1964); ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 2-3 (Center for Studies in Criminal Justice, 1968); Smith, *Capital Punishment*, 59 ALBANY L.J. 232, 241 (1899); Shipley, *Does Capital Punishment Prevent Convictions?* 43 AM.L.REV. 321 (1909).

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to avoid the death penalty. The inevitable propensity of

In *McGautha v. California*, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.* at 198, and the fact that "jurors on occasion took the law into their own hands in [murder] cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense," *id.* at 199. *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (concurring opinion of Justice Frankfurter); KALVEN & ZEISEL, THE AMERICAN JURY 306-312 (1966); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32 (1974). *Cf.* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT ¶¶ 27-29 (H.M.S.O. 1953) [Cmd. 8932]; 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 154-160 (1948). "[B]y far the most pronounced argument in favor of ending mandatory death penalties, echoed on every side, was the extreme difficulty of obtaining convictions in cases where a conviction is tantamount to a death sentence." BEDAU, THE DEATH PENALTY IN AMERICA 27 (rev. ed. 1967). This fact is cited by scholars as a reason for a particular jurisdiction's shift from a mandatory to a discretionary system of death sentencing or for a decline in a jurisdiction's conviction rate. *See, e.g., The Death Penalty in the United States*, 9 GREENBAG 129 (1897) (New York); McCafferty, *Major Trends in the Use of Capital Punishment*, 25 FED. PROB. No. 3 15 (1961) (District of Columbia); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 28-31 (1965) (New Jersey); Phelps, *Rhode Island's Threat Against Murder*, 18 J. CRIM. L. & CRIM. 552 (1928) (Rhode Island); Bennett *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A.J. 1053 (1958), and

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any "mandatory" death-sentencing regime to produce this sort of selective evasion by juries is, of course, enhanced when the death penalty is made "mandatory" for a broad range of offenses including all first degree

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(footnote continued from preceding page)

Bennett *Delaware Abolishes Capital Punishment*, 49 J. CRIM. L., CRIM. & POL. SCI. 156 (1958) (Delaware).

Cf. Wicker, "Christmas on the New Death Row," N. Y. Times, Dec. 25, 1973, at 18, col. 1:

> "Raleigh, N.C. Dec. 24 ... In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; ... Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

murders, rapes, first degree burglaries and arsons.[134] It is encouraged, and all but explicitly condoned, by the North Carolina Supreme Court's ruling – which appears to have no other purpose or effect than to invite the exercise of jury discretion – that capital jurors may be informed of the consequences of their supposedly "mandatory" verdict and its alternatives. *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). There, the court held that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence ... sufficient compelling reason exists to justify [the trial judge's] ... informing the jury of the consequences of their possible verdicts." 204 S.E.2d at 828. The court additionally ruled that "[c]ounsel may, in his argument to the jury, in any

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[134]Indeed, there is evidence that North Carolina adopted a discretionary form of capital sentencing in order to avoid unwarranted acquittals for these crimes by juries who did not want to see sympathetic defendants executed. In 1949, the Special Commission for the Improvement of the Administration of Justice in North Carolina reported that:

> "[o]nly three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, though guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. [A discretionary death penalty] ... is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases."

15 POPULAR GOVERNMENT 13 (January, 1949). A discretionary capital sentencing procedure was adopted shortly thereafter. *See also State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. . . ." The defense attorney is not forbidden, "in his argument to the jury [to] . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." *Id.* at 829.

The manner in which juries function in capital cases – particularly when they are told explicitly what is at stake – has been judicially noticed by the Supreme Court of North Carolina[135] and cannot realistically be ignored by this Court.[136] We venture to say that not a year passes when the certiorari process does not present a multitude of cases, rationally undifferentiable from petitioner's, in which a jury has returned a verdict of second degree murder or less. An altercation in a bar – a separation and renewed meeting of the combatants – some alcohol – a gun: the ingredients are tragically common. They form the backdrop of innumerable killings, crimes whose gravity no one can doubt, but which differing juries have immemorially treated as manslaughter, second degree murder, or first degree murder upon grounds that can only be described as inscrutable. The law reports of North Carolina are full of such cases where the verdict was less than first degree.[137] Spectroscopic color-matching of particular

[135] *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107 *supra*; *State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra*; *State v. Brittain*, 89 N.C. 481, 501 (1883), quoted in text at p. 81, *supra*.

[136] *Cf. Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion of Mr. Justice Frankfurter).

[137] We collect some of the cases in Appendix C, pp. 1c-4c

cases with petitioner's undoubtedly discloses all of the more or less subtle differences of which the multifariousness of human existence is made. But it is impossible to read any number of these cases and deny the purely discretionary character of the jury judgments they reflect.

D. Executive Clemency

The North Carolina Constitution provides that:

> "[T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons."

Article III, § 5(6). Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of 235 out of a total of 358 condemned prisoners were commuted.[138] The chief executive thus commuted 65.6% of North Carolina death sentences over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature only the right to prescribe the "manner of applying for pardons;" otherwise, the Governor may grant or deny clemency as he chooses, subject to "such conditions as he may think proper."

[138] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 192 (1964). *See* notes 146, 147 *infra*.

The North Carolina Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> "[i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable."

Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

This conception of executive clemency is, of course, widespread; but it may be noted that the authority of the Governor of North Carolina in its exercise is less encumbered than that of the governors of many States. Several of the States which retain the death penalty have chosen to place some or all of the authority to make the clemency decision in the hands of a pardon board or executive council,[139] while others require periodic reports to legislative bodies on the exercise of executive clemency,[140] open hearings,[141] preparation of reasoned decisions on each application,[142] or, in certain kinds of cases, the advice of judicial authorities.[143] The

[139]*See, e.g.*, Conn. Gen. Stat. Rev. § 18-24a (1970); Idaho Const. art. 4, § 7; Utah Code Ann. § 77-62-2 (1968); Neb Const. art. 4, § 13.

[140]*See, e.g.*, N. Y. Const. art. 4, § 4; Ark. Code Ann. § 41-4714 (1973 supp.).

[141]*See, e.g.*, Idaho Const. art. 4 § 7; Neb. Const. art. 4, § 13; Pa. Const. art. 4, § 9.

[142]*See, e.g.*, Del. Const. art. 7, § 1; Utah Const. art. 7, § 12.

[143]*See* California Const. art 5, § 8 (1974 West cum. supp.).

North Carolina procedure requires none of these things.[144]

Under laws providing for a "mandatory" death penalty, grants of clemency have been considerably more frequent than under procedures giving juries explicit discretion to sentence convicted capital defendants to life or death. A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations of death sentences after the 1941 and 1949 statutory amendments which enabled juries to impose sentences of either life imprisonment or death for the four crimes that had theretofore carried "mandatory" death penalties.[145] A 1973 report on the history of the death

[144]North Carolina has, however, adopted the practice of announcing reasons for the grant, but not for the denial, of executive clemency. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 158 (1964).

[145]Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166-167 (1957). A study of the history of the death penalty in New Jersey also found evidence that clemency is afforded more frequently under a "mandatory" system than under a discretionary system. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964). During the years when the death penalty was mandatory (1907-1915), there were 42 executions and 11 death sentences commuted, a ratio of 11/42 or 26.2%. *Id.* at 10. However, during the years 1916-1960, when a discretionary system of capital punishment was in effect, there were 115 executions and 22 commutations, for a ratio of 22/115 or 19.1%. *Ibid.*

penalty in the State found that while 64%[146] of condemned defendants escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38% for the 1949-1962 period, when a discretionary death penalty was in effect for all "capital" crimes.[147]

The apparent explanation for this phenomenon is that in a "mandatory" system, the clemency authority undertakes to compensate for mitigating factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the imposition of sentence. Clemency serves "as a vehicle for the expression of society's compassion, as an outlet from the rigorous inflexibility of [the] . . . judicial system."[148] One study has noted:

> "[i]n a jurisdiction which provides for the sentence of death unless the jury recommends

[146]BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3 (N.C. Dept. of Corrections 1973). This 64% figure is slightly different from the commutation rate cited in the *N.Y.U. Law Review* study, p. 95 *supra*, because the years surveyed (1903-1963 in the *N.Y.U. Review* study; 1910-1948 in the Behre study) were not identical. Another study of executive clemency in North Carolina reveals that of the 304 death sentences imposed between July 1, 1938, and December 31, 1953, 229 were commuted by the Governor, for a 77.1% clemency rate during this period. Johnson, *supra* note 145, at 166.

[147]BEHRE, *op. cit. supra* note 146, at Tables 2 and 3.

[148]Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 38 (1965).

> mercy, the judge being bound by the jury's recommendation to impose a sentence, the clemency authority would normally refrain from reweighing the mitigating evidence presented at the trial. Obviously, the jury has here had the opportunity to assess extenuating circumstances apart from the issue of guilt. It is the belief of many that this function of the jury strips the clemency authority of much of its power in capital cases."[149]

If this observation is correct, the "mandatory" death penalty created by *State v. Waddell* is calculated to result in more frequent grants of executive clemency as the Governor effectively takes over where the jury leaves off. Not surprisingly, the clemency process will simply mirror the jury sentencing process condemned in *Furman*, with Governors granting or denying commutation according to standards that are unexplained, unreviewable, and changeable whenever different incumbents take office.[150]

[149]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 165-166 (1964) (footnote omitted).

[150]*See* the studies cited in note 145 *supra*. A system which places uncontrolled powers of commutation in the hands of a single official is arbitrary by definition. It can also be demonstrated that such a system is likely to be discriminatory in effect. A comparison of the executed and the commuted among condemned prisoners in Pennsylvania between 1914 and 1958 revealed that "less than 15 percent of the death-row offenders with court-appointed counsel received commutation of sentence compared to over 25 percent of those offenders with private counsel" (this differential was characterized as statistically significant for black, but not for white defendants) and that "there is reason to suspect – and statistically significant evidence

(continued)

"For clemency knows no standards that are invocable as a matter of law. To the saved, this is mercy, of a quality not strained. To those who learn they are to die, it is irrational choice for death – the final such choice in a long series."[151]

The various forms of arbitrary selectivity remaining in North Carolina's "mandatory" death penalty procedure thus insure that there will be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. We do not suggest by the foregoing analysis that the selective discretion present at any of the separate stages of the criminal process would be constitutionally

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to support the suspicion – that Negroes have not received equal consideration for commutation of the death penalty." Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301, 309, 311 (1962).

A study of executive clemency in Illinois concluded:

"[c]ertain troublesome patterns seem to suggest themselves from an analysis of the referent Illinois commutation cases. It seems that much depends upon mere luck! What kind of attorney happens to be appointed by the state? How zealous is he in delaying execution through legal maneuvers and in generating publicity and public pressure? Of what logical relevance to life and death is a public relations campaign?"

Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 39 (1965).

[151]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 74 (1974).

objectionable in a non-capital case[152] or even that any one form of discretion would necessarily be enough to invalidate a death penalty under the Eighth Amendment. But the arbitrariness of the entire procedural system is cumulative; and the gauntlet which a capitally charged defendant must now run is fully as unpredictable – its results equally capricious – as under the pre-*Furman*, pre-*Waddell* system. At no point in the process is a visible and deliberative life-death choice required; yet the inevitable discretionary decisions can only be more freakish and wanton inasmuch as they are disguised and more diffused. This deadly lottery brings petitioner's death sentence to the heart of the historic concerns of the Eighth Amendment as recognized in *Furman*.

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[152]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 33 (1974):

"[o]ur legal system is simply saturated, at all levels, with the ideas that requirements of fairness, certainty, and so on – all the things we mean when we say 'due process of law' – vary with the seriousness of the interest at stake, and that, as a corollary, imposition of the penalty of death carries with it a more exacting requirement than other punitive action of the political society."

Cf. Bell v. Burson, 402 U.S. 535, 540 (1971); *Stanley v. Illinois*, 405 U.S. 645, 650-651 (1972). *See also* pp. 115-117 *infra*.

III.

THE EXCESSIVE CRUELTY OF DEATH

There are additional reasons why the death penalty reinstated by *Waddell* violates the essential guarantees of the Eighth and Fourteenth Amendments. These reasons are interrelated in the prevailing *Furman* opinions, and we treat them together here. Essentially, *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This was so because the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and occasional under North Carolina's post-*Furman*, purportedly "mandatory" system of capital sentencing because that system provides numerous mechanisms which express and implement the unwillingness of prosecutors, judges, juries and the Governor to accept a general, uniform and even-handed application of the penalty. These mechanisms and their use continue to be the means by which a punishment incapable of general

or substantial application is reserved for visitation on a mute and disfavored few. That sort of application of a penalty is one of the hallmarks of a cruel and unusual punishment in the Eighth Amendment sense. In this Part III, we examine the several relevant hallmarks and submit that they collectively condemn the penalty of death. Such an examination should, however, begin with consideration of the proper standards of judicial review of a penalty challenged under the Eighth Amendment.

A. The Standard of Judicial Review

We start with the "elementary" truth[153] that legislative authorization of a punishment does not establish its conformity to Eighth Amendment principles of decency.[154] If this were otherwise, the Eighth Amendment would be "little more than good advice" from the Founding Fathers to future legislators. *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion of

[153] *Weems v. United States*, 217 U.S. 349, 379 (1910).

[154] *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion of Chief Justice Warren):

> "[w]e are oath-bound to defend the Constitution. This obligation requires that [legislative] ... enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."

Chief Justice Warren.)[155] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This basic postulate is the source of the most delicate problem of Eighth Amendment adjudication: striking the balance between respect for the primary legislative power to define crimes and fix sanctions[156] and the diligence commanded by the constitutional role of the judiciary to protect and preserve the Constitution's

[155]George Mason, who drafted the 1776 Virginia Declaration of Rights, *see* note 56 *supra*, which contained a prohibition of cruel and unusual punishments that was almost identical to that of Clause 10 of the English Bill of Rights of 1689 and to the Eighth Amendment, declared in the Virginia ratifying convention that it was necessary to limit the arbitrary punishing power of all branches of government. *See* pp. 38-39 *supra*. Patrick Henry strongly agreed that Congress should not be allowed to "define punishments without this control." 3 ELLIOT'S DEBATES 447 (2d ed. 1863). *See* note 55 *supra*.

[156]In this litigation we deal, of course, with a decision to maintain capital punishment that was made by a bare majority of the North Carolina Supreme Court through the application of state-law severability doctrines to a state statute. Nevertheless, that decision speaks with the voice of North Carolina for federal constitutional purposes. *See Winters v. New York*, 333 U.S. 507, 512-515 (1948); *Cohen v. California*, 403 U.S. 15, 23-24 n.5 (1971).

guarantees of individual rights against governmental – that is, necessarily, majoritarian – overreaching.[157] The inescapable tension and its resolution were described with as much precision as the subject permits in *Weems v. United States*, 217 U.S. 349, 378-379 (1909):

> "... prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such cases, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, – that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by

[157]*Furman v. Georgia*, *supra*, 408 U.S. at 431 (dissenting opinion of Mr. Justice Powell) (citing *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion)):

> "[t]he review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that the Court is called on to perform.'"

> presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

Thus, although a fitting deference to legislative will and to the autonomy of the States is always required, this Court bears the responsibility, placed exclusively upon it in the last analysis, to define and uphold the specific limitations which a written Constitution has erected as the boundaries beyond which no action or decision of American government may go.[158]

There are circumstances under which the danger is particularly great that legislative judgment will not duly heed the constitutional rights of individuals. Here judicial scrutiny of legislation ought to be commensurately exacting. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). This is most frequently the case where statutes fall harshly only upon "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938),

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[158] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

> "[i]n 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

See also United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090, 3106 (1974).

and where their operation takes a form that "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," *id.* at 152 n.4. It is especially the case where cruel criminal punishments are applied to a very few: that is, in circumstances where the Eighth Amendment may be colorably invoked. And in the present case, additional considerations arising from the unique nature of the punishment of death require an uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, *supra*, 356 U.S., at 101.

First, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100. The Amendment stands to assure that respect for individual human life and dignity restricts the state's responses to even the most culpable criminal conduct. Yet the decision to use capital punishment on a man implies a judgment that his dignity and worth may be denied absolutely, that his " 'life ceases to be sacred when it is thought useful to kill him.' "[159] Such a judgment deliberately to extinguish human life[160] —

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[159] Francart, quoted by Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 176 (Mod. Lib. 1963).

[160] "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.' " *Furman v. Georgia*, *supra*, 408 U.S. at 290 (concurring opinion of Mr. Justice Brennan).

to employ a sanction that necessarily denies the very value upon which the Eighth Amendment rests – imperatively calls upon "the obligations [of] . . . the judiciary to judge the constitutionality of punishment" from an independent perspective. *Furman v. Georgia, supra,* 408 U.S. at 313-314 (concurring opinion of Mr. Justice White).

Second, the death penalty bears an awesome and irrevocable finality[161] incomparable with other punishments.[162] This Court has said of sterilization that "[t]here is no redemption for the individual whom the law touches." *Skinner v. Oklahoma ex rel. Williamson, supra,* 316 U.S. at 541. That is *literally* true of capital punishment. No eloquence can embellish, nor human mind entirely conceive, death's utter irreversibility.[163] New

[161]"Capital punishment is an evil, unless justified [because] . . . it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life." Black, *Crisis in Capital Punishment,* 31 MD. L. REV. 289, 291 (1971).

[162]Thus, the declaration of Lafayette that infliction of the death penalty should be suspended "until . . . the infallibility of human judgment is demonstrated." Quoted in Pollak, *The Errors of Justice,* 284 ANNALS 115 (1952), and CLARK, CRIME IN AMERICA 334 (1970). The quotation has also been attributed to Jefferson. *See* BLOCK, AND MAY GOD HAVE MERCY . . . 1 (1962). *See also* Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty,* 15 CRIME & DELINQ. 121, 130-131 (1969).

[163]"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed perhaps after many years in prison by the discovery of the real criminal."

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knowledge, second thought, calmer passions, lessons of experience – every known corrective for the inevitable errors of judgment in penological, political, and constitutional experimentation comes too late.[164]

Third, any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which a civilized, Twentieth-Century society can accept.[165] We do not deal here with a punishment that can be considered cruel only in relation to the conduct that it is used to regulate, *cf. Robinson v. California,* 370 U.S. 660, 667 (1962) –

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SELLIN, THE DEATH PENALTY, 63 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959). *See also* Hogan, *Murder by Perjury,* 30 FORDHAM L. REV. 285 (1961); BORCHARD, CONVICTING THE INNOCENT 294-303, 309-316 (1932); Gardner, *Helping the Innocent,* 17 U.C.L.A. L. REV. 535 (1970).

[164]"[D]eath is different . . . it is irrevocable in quite a distinct sense from the general irrevocability of all happenings. If a mistake of any kind is discovered, it is too late. In every way and for every purpose, it is too late." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 32 (1974).

[165]The evolutionary character of Eighth Amendment standards no longer needs argument. The Clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States,* 217 U.S. 349, 378 (1910). *See also Furman v. Georgia, supra,* 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas; *id.* at 264-269 (concurring opinion of Mr. Justice Brennan); *id.* at 325-328 (concurring opinion of Mr. Justice Marshall); *id.* at 383 (dissenting opinion of Chief Justice Burger); *id.* at 409 (dissenting opinion of Mr. Justice Blackmun); *id.* at 429 (dissenting opinion of Mr. Justice Powell.)

cruel in "consideration of the mischief and the remedy", *Weems v. United States, supra*, 217 U.S. at 373.[166]

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

It is not an overstatement to describe confinement under sentence of death as exquisite psychological

[166]Nevertheless, Camus' point deserves note:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."

Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 151-152 (Mod. Lib. 1960).

torture. *See People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 894 (1972). With the commendable motive – and under the inescapable obligation – of striving to avoid erroneous or illegal executions, Twentieth-Century American justice has prolonged that torture. Of 608 persons under sentence of death at the end of 1970, 302 had been on Death Row for more than three years, 165 for more than five years, 81 for more than seven years, and 67 for more than eight years.[167] "[C]ontemporary human knowledge"[168] of the nature of suffering and its effects upon the human mind teaches that over such extended periods the familiar manifestations of immediate terror cease as the extraordinary anxiety and pain of condemnation find other outlets. Anguish can no longer be conceived as some enormous multiple of the pain of a broken bone or a crushed fingernail, because human beings cannot tolerate many such multiplications without severe personality distortions such as the denial of reality.[169] The effects of these coping mechanisms observed in Death Row prisoners are acute;[170] the alternative is emotional

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[167]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 42 (August, 1971).

[168]*Robinson v. California*, 370 U.S. 660, 666 (1972).

[169]*See*, Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 827 (1972).

[170]*See* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

breakdown.[171]

The torture is perhaps more nearly comprehensible in the words of those who have suffered it:

> "My feeling toward being on death row is unlimited. I can go on and on telling you the different feelings I experience being on Death Row. But I'm going to make it brief, because I can take the 68,634,000 square miles of the Pacific Ocean and put it into ink, and take all the trees in America and put them into pencils and paper, and still, it won't be enough material to express my feeling towards being on death row. My feeling being on death row is like no tomorrow. When I go into deep meditation, I can see life and feel the freedom that the universe has to offer, but when I come out of it, it's like being in the middle of a nightmare. So you can see why my thoughts has no end.

[171]An evaluation of eight North Carolina death row inmates revealed that three, or thirty-five percent, had made "relatively poor adjustments, with obvious deterioration." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 81, 82, 1972. One of these had developed a complex delusional system; another became increasingly self-destructive and a third was constantly under medication "with varying degrees of unsustained relief" and was once hospitalized for drug overdose. *Id.* at 82-83. *See also* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125, 127 (G.P.O. 1970); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion of Justice Frankfurter).

> I feel as tho the world is caving in on me."[172]

The physical and psychological pain of execution itself – whether life is destroyed by gas, by electrocution, or by other means – is, of course, unmeasurable.[173] It is

[172]Coley, *A Letter from Death Row*, 3 JURIS DOCTOR 19 (Dec. 1973). *Cf.* DOSTOEVSKY, THE IDIOT 20 (Mod. Lib. 1935). *See generally* LEVINE (ed.), DEATH ROW–AN AFFIRMATION OF LIFE (1972); CHESSMAN, TRIAL BY ORDEAL 3 (1955):

> "I've witnessed the disintegration of the minds of the men around me. I've seen these men naked on the floor, rolling in their own excrement. I've listened as they smashed and shattered the sinks and toilets and fixtures in their cells. I've heard their prayers and their screams and their curses. I've observed their bodies being removed after they had destroyed themselves. I've read their pathetic pleas for mercy."

[173]All medical witnesses agree that it takes a few seconds for the condemned man to lose consciousness after inhaling lethal gas. *See* Hamer, *The Execution of Robert H. White by Hydrocyanic Acid Gas*, 95 J. AM. MED. ASSN. 661 (1930); Rosenbloom, *Report of a Case of Chronic Hydrocyanic Acid Poisoning*, 8 J. LAB. & CLIN. MED. 258 (1923); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 251-256 (H.M.S.O. 1953) [Cmd. 8932]. Other scientists assert that the condemned man is conscious for a longer time and dies by slow agonizing strangulation. KEVORKIAN, MEDICAL RESEARCH AND THE DEATH PENALTY 18-19 (1960). *See also* Schmitt & Schmitt, *The Nature of the Nerve Impulse: The Effect of Cyanides Upon Medullated Nerves* (Pt. 2), 97 AM. J. PHYSIOLOGY 302, 302-304 (1931). *Cf.* DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 102-103 (1962):

> "[t]he warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water

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one of the questions to which capital punishment cuts off an answer, leaving only such scant comfort or nagging doubt as speculation may provide. "Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death." *Furman v. Georgia, supra,* 408 U.S. at 287 (concurring opinion of Mr. Justice Brennan). Here again, the ordinary deference due to legislative judgment encounters the objection that legislators, in common with all other men, simply *cannot* know significant facts on which advised, dispassionate judgment ought to turn at least in part. The decision to kill a human being is intractably a decision to do an act whose most immediate major consequences are unknowable. No amount of legislative inquiries or knowledge can close up that gap (*compare, e.g., McGinnis v. Royster,* 410 U.S. 263 (1973)), and all a legislature's "groping efforts" at experimenting with the penalty of death (*compare, e.g., Tigner v. Texas,* 310 U.S. 141, 148 (1940)) will not provide its members or mankind more information on the subject.

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> and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way."

Evidence regarding the experience of electrocution is similarly inconclusive. A French scientist, Dr. L. G. V. Rota, has said "I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be." Quoted in SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 219 (1950).

Fourth, the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations.[174] Capital punishment has been abolished by most of the countries of Western Europe and the Western Hemisphere,[175] and is now in virtual disuse throughout the world.[176] A penalty thus progressively repudiated on a world-wide scale surely warrants close and critical examination when tested by the constitutional standards of decency of a Nation whose citizens would be widely appalled to believe it laggard in the enlightened administration of justice.[177]

Fifth, long-standing traditions defining the judicial role in capital cases recognize the need for close

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[174]Despite a wave of terrorist bombings in 1974, the British House of Commons decisively rejected a measure to reinstitute the death penalty in Great Britian for terrorist murders. N.Y. Times, Dec. 12, 1974, at 7, col. 1.

[175]An analysis of world-wide trends in the authorization and use of the penalty of death is contained in Appendix D, pp. 1d - 6d *infra.*

[176]"Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) 3 (February 23, 1971).

[177]In declaring denationalization a cruel and unusual punishment, the Court relied in part upon the fact that "[t]he civilized nations of the world [were] . . . in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Trop. v. Dulles, supra,* 356 U.S. at 102.

scrutiny of the punishment of death. The principle of strict construction *in favorem vitae* runs deep in Anglo-American history,[178] and is only one exemplification of the special safeguards that apply in legal proceedings when life is at stake:

> "[a]ll the state legal systems in one way or another – by requiring jury unanimity, by forbidding pleas of guilty to a capital offense, by providing for automatic appeals, and so on – have recognized this distinction, quite without compulsion from the national Supreme Court. But when such compulsion was needed it has been forthcoming. For many years our federal Supreme Court required of the states that they invariably assign counsel in capital cases, while leaving the question of counsel in noncapital cases open to variation based on special circumstances; the fact that at last the Court decided counsel should be required in all serious criminal cases does not impair the force of the earlier cases as establishing national recognition of the immense difference between imprisonment and death. On the other side of the coin, the Supreme Court has several times upheld, as not violating any federal guarantee, state laws imposing more stringent requirements for trial in capital cases than in other cases."[179]

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[178] *See* 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-106 (1948).

[179] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 34 (1974). Professor Black refers, of course, to the evolution from *Powell v. Alabama*, 278 U.S. 45 (1932), through *Betts v. Brady*, 316 U.S. 455 (1942), to *Gideon v. Wainwright*, 372 U.S. 335 (1963); and to such cases as *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Review of procedural issues in death cases has been pursued under a policy of resolving legal "doubts . . . in favor of the accused,"[180] and capital convictions generally have been scrutinized on appeal with an avowedly strict eye for error.[181] At a time when the other considerations we have enumerated raise the question of the continuing constitutional validity of the death penalty itself, it is appropriate that the same strict scrutiny be turned upon that question.

Finally, in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands. Other punishments – even punishments of extreme severity – are and have long been accepted without the extraordinary controversy, the collective soul-searching, and the parade of elaborate justifications and rationalizations that have accompanied the peculiar institution of capital punishment. Despite the relatively minuscule number of its victims[182] the justifiability of the death penalty has been the subject of continuing and heated

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[180] *Andres v. United States*, 333 U.S. 740, 752 (1948). *See also, e.g., Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id.* at 77 (concurring opinion of Justice Harlan).

[181] Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 659 (1974), and authorities cited.

[182] In 1970 nearly 80,000 persons were admitted to state and federal adult correctional facilities, only 127 of whom were under sentence of death. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 358, 465 (August 1973).

debate[183] in religious, academic, legislative and law enforcement circles and among the general public. It is surely the case that "[a]t the very least . . . contemporary society views this punishment with substantial doubt." *Furman v. Georgia, supra,* 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

The moral character of this debate is as significant as its prevalence. The opposition to capital punishment – frequently voiced by religious denominations,[184] among others – has been vigorously asserted on the basis of "fundamental moral and societal values in our civiliza-

[183]The arguments for and against capital punishment have been frequently catalogued. *See, e.g.,* Vialet, *Capital Punishment: Pro and Con Arguments* (United States, Library of Congress, Legislative Reference Service, mimeo. August 3, 1966), reprinted *in Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 172-200 (G.P.O. 1970); BEDAU, THE DEATH PENALTY IN AMERICA 120-123 (rev. ed. 1967); 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1363 (G.P.O. 1970). *See* notes 184-186 *infra.*

[184]For a description of the positions taken by various religious groups in opposition to capital punishment, see Bedau, *The Issue of Capital Punishment,* 53 CURRENT HISTORY No. 312 82, 84-85 August 1967).

tion and in our society."[185] Proponents of the death penalty have responded with equal moral fervor.[186] Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument.

[185]Canadian Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II) 4370 (Nov. 16, 1967). For similar expressions, *see, e.g.,* Kazis, *Jewish Tradition and Capital Punishment,* 6 TRENDS 6 (Nov.-Dec. 1973); Editorial, *Genesis and Capital Punishment.* 66 CHRISTIAN CENTURY 355 (March 28, 1973); *Controversy Over Capital Punishment: Pro & Con,* 52 CONG. DIGEST 1, 10, 12, 16, 20, 26 (1974); National Council on. Crime and Delinquency *Policy Statement on Capital Punishment,* 10 CRIME & DELINQ. 105 (1964); McGee, *Capital Punishment as Seen by a Correctional Administrator,* 28 FED. PROB. No. 2 11 (1964); Milligan, *A Protestant's View of the Death Penalty,* in BEDAU, THE DEATH PENALTY IN AMERICA 175 (rev. ed. 1967); Ehrmann, *For Whom the Chair Waits,* 26 FED. PROB. No. 1 14 (1962); BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957)

[186]*See, e.g.,* Vellenga, *Christianity and the Death Penalty,* 6 CHRISTIANITY TODAY 7 (Oct. 12, 1959); Hon. Samuel Leibowitz, in *Symposium on Capital Punishment,* 7 N.Y.L.F. 249, 289-296 (1961); *Controversy Over Capital Punishment: Pro & Con,* 52 CONG. DIGEST 1, 11, 13, 15, 21, 25 (1974); Kinney, *In Defense of Capital Punishment,* 54 KY. L. J. 742 (1966); McDermott, *Some Crimes Demand the Death Penalty,* 11 POLICE 4 (Mar.-April, 1967); Caldwell, *Why Is the Death Penalty Retained?* 284 ANNALS 45 (1952); Coakley, *Capital Punishment,* 1 AM. CRIM. L. Q. 27 (1963); Cohen, *The Need for Capital Punishment,* 20 CHITTY'S L.J. 86 (1972); Hook, *The Death Sentence,* in BEDAU, THE DEATH PENALTY IN AMERICA 146 (rev. ed. 1967); Barzun, *In Favor of Capital Punishment,* 31 AM. SCHOLAR 181 (1962).

Agonizings of this sort that can neither be resolved nor stilled suggest a widespread perception that there is something fundamentally questionable about the penalty of death. In view of the extreme infrequency of its use, the troubled concerns which the punishment invariably arouses can only be explained by its uniquely and profoundly problematic aspects: its dissonance with the basic values of our society. For reasons to which we shall return – reasons having to do primarily with the rarity and secrecy of the actual use of the death penalty and with the outcast character of those subjected to it[187] – the problematic aspects of capital punishment have not stayed state and federal legislatures from enacting it. But those aspects particularly warrant independent and stringent examination of the death penalty by this Court at a moment when the Nation, which has not executed a man or woman for seven and a half years, agonizes once again upon the brink.

Such an examination requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is] . . . deemed to serve."[188] Because of the unique character of the death penalty,[189] those justifications must be real and substantial;[190] and they must conform

[187] *See* pp. 134 - 139, *infra.*

[188] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[189] *See* pp. 107 - 120 *supra.*

[190] *Cf. N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964) (involving the right of association). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

to the fashion in which the penalty is applied in fact.[191] If "less drastic means for achieving the same basic purpose"[192] are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[193] This much is implied in "the duty of [the] . . . Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification,"[194] or whether, conversely, the punishment of death is excessive[195] and therefore unconstitutional.

B. THE JUSTIFIABILITY OF THE PENALTY OF DEATH

Criminal punishments are traditionally justified by five related but separable objectives: reformation and

[191] *Cf. Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963) (involving the right of free speech). *See also e.g., Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Carrington v. Rash*, 380 U.S. 89, 94-96 (1965).

[192] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (involving the right of association).

[193] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[194] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (involving the right of association).

[195] *Furman v. Georgia, supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justice Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall).

rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence. It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties.

Of the first two of these objectives, little need be said. Clearly "reformation . . . can have no application where the death penalty is exacted."[196] The imposition and execution of a death sentence are not designed to serve as instruments for the redemption of criminal offenders: to the contrary, they represent a determination that the offender is unredeemable.[197] Similarly, the moral reinforcement or reprobation function provides no substantial justification for the unique harshness of the death penalty.[198] While this

[196]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 18 (H.M.S.O. 1953) [Cmd. 8932]. *See also* SELLIN, THE DEATH PENALTY 69-79 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959); KOESTLER, REFLECTIONS ON HANGING 144-152 (Amer. ed. 1957); BEDAU, THE DEATH PENALTY IN AMERICA 395-405 (rev. ed. 1967); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

[197]*Cf.* Stephen, *Capital Punishment*, 69 FRASER'S MAGAZINE 753, 763 (1864): "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world. Take your chance elsewhere.'"

[198]*See* Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3, 16-17, 19 (1967).

objective doubtless requires that the most serious crimes be punished most seriously, "[g]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty."[199] This objective contains no commensurability standard whereby the relative efficacy of the death penalty and life imprisonment can be judged. A severe punishment of any kind enforces equally the restraints of the criminal law.

While the death penalty may have once been necessary to control dangerous criminals, the development of a penitentiary system in the Nineteenth Century has provided an alternative means of containing such persons.[200] Moreover, there is evidence that

[199]BEDAU, THE DEATH PENALTY IN AMERICA 268 (rev. ed. 1967).

[200]*See* Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232:

> "[i]n 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them – in short, none of the attitudes, facilities and

(continued)

convicted murderers are less likely to engage in future criminal behavior than are other classes of offenders.[201] The execution of criminal defendants to insure their

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[footnote continued from proceeding page]

> personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

There are now in this country, 4,401 state, federal and local correctional facilities employing more than 70,000 people. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 108-109 (August 1973).

[201] A study of parole violation found that "[t]he percentage of Willful Homicide violators returned to prison on new commitments . . . [was], with one exception (Alcohol Laws Violations), the lowest in any offender group." Neithercutt, *Parole Violation Patterns and Commitment Offense*, 9 J. RESEARCH CRIME & DELINQ. 87, 90 (1972). The murderer has also been found to have "a lower 'criminality level' than the non-murderer [while] in the prison population." Waldo, *The "Criminality Level" of Incarcerated Murderers and Non-Murderers* 60 J. CRIM L., CRIM. & POL. SCI. 60, 70 (1970). Of twenty-six homicides committed in American prisons in 1964, only two were committed by inmates serving sentences for capital murder. Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

effective isolation from society is an excessive punishment since less drastic means now exist to protect society (and are customarily used, for example, to constrain homicide defendants whose mental condition renders them incompetent to stand trial). Although the death penalty effectuates the goal of isolation of offenders, it is an unnecessarily harsh mechanism for obtaining this result.

The fourth traditional goal of criminal punishments is retribution, the achievement of the ancient *talionis* principle.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law."

Furman v. Georgia, supra, 408 U.S. at 308 (concurring opinion of Mr. Justice Stewart). The question of how far retribution, standing alone, is a legitimate goal of the criminal law in the mid-1970's is a complex one; but this case does not present that question for decision, since the death penalty as it is administered under the *Waddell* decree is not retributive in any meaningful way:

> "the issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small

[50b]

> and highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[202]

The concept of retribution requires both a factual equivalency and a procedural regularity in the imposition of punishment[203] which are simply not present in the administration of the death penalty for first degree murder, as we have demonstrated in Part II *supra*. While the *Waddell* death penalty might be sought to be justified indirectly in light of a retributive goal as a device to forestall private acts of vengeance, there is no empirical evidence that lynch law increases as executions decline. In fact, the relation between the lynching rate and the execution rate appears to be more one of direct than inverse proportionality, as the following statistics demonstrate:

Known Executions[204]

Decade	Legal	Illegal
1890's	1,214	1,540
1900's	1,176	885
1910's	1,031	621
1920's	1,162	315
1930's	1,667	130
1940's	1,284	5
1950's	717	2[205]

[202]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961).

[203]*See also* Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT 239, 243 (1967):

> "If we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[204]BOWERS, EXECUTIONS IN AMERICA 40 (1974).

[205]Available data on illegal executions ended in 1956 *Ibid.*

There is yet another sense in which the death penalty can be said to bear no meaningful relation to the goal of retribution, for the *lex talionis* affords no commensurability standard. The attempts of various post-*Furman* statutes to authorize the death penalty for "outrageously or wantonly vile, horrible or inhuman" killings[206] attest to this difficulty. For surely there is no retributive logic to justify the simple asphyxiation or electrocution of a defendant who has committed an atrocious crime: such a crime demands a far harsher punishment (under this logic) than the "mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890) But such punishments are clearly forbidden by the Eighth Amendment. With these constitutional limitations, it cannot be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty.

The most frequently voiced justification for the death penalty is the deterrence of capital crimes However, as the empirical findings collected in Appendix E to this brief, pp. 1e-10e *infra*, conclusively demonstrate, there is no credible evidence – despite the most exhaustive inquiry into the subject – that the death

[206]Ga. Code § 27-2534.1 (1) (7) (1973). *See* Appendix A, p. 22a *infra*.

penalty is a deterrent superior to lesser punishments.[207] The conclusions set forth in Appendix E may be briefly summarized. Official and scholarly inquiries have concluded overwhelmingly that use or disuse of the death penalty has no effect upon the frequency of criminal homicide. This conclusion is based on the following statistical evidence.

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.

[207]The few published claims of deterrent efficacy are based upon impressionistic accounts of law enforcement officers and do not explain the failure of the death penalty to affect crime rates. *See, e.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 130 (rev. ed. 1967); Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU, THE DEATH PENALTY IN AMERICA 135 (rev. ed. 1967). We know of only one research-based claim of the deterrent efficacy of the death penalty. It is based upon unpublished findings but has been alluded to in a recent article as "indicat[ing] that each execution prevents between 8 and 20 murders." Tullock, *Does Punishment Deter Crime?*, THE PUBLIC INTEREST No. 36 103, 108 (1974), referring to Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, "to be published" in THE AMERICAN ECONOMIC REVIEW, *id.*, at 111. Tullock goes on to say that: ". . . unfortunately, the data available for this study were not what one would hope for, so not as much reliance can be put upon [the] . . . results as one normally would give to work by such a sophisticated econometrician." *Id.* at 108.

> In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.
>
> Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.
>
> Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.

The same conclusion has been reached with regard to the "mandatory" death penalty; "no indication" has been found "that the mandatory death penalty [is] . . . a more effective deterrent of homicide than discretionary capital punishment."[208]

These findings are not surprising. For, in the first place, "crimes are committed for reasons other than a rational weighing of consequences."[209] And, in the second place, the very aberrational, violent behavior to which the death penalty is now exclusively applied is less deterrable than any other human behavior, whether the sanction is death or imprisonment:

> "[t]he deterrence argument requires that man be an essentially rational being, weighing all the possible consequences of his acts and rating the desirability of each possible consequence. Whether or not this view of man is generally true is

[208]BOWERS, EXECUTIONS IN AMERICA 160 (1974).

[209]Brief *Amicus Curiae* of the Committee of Psychiatrists for Evaluation of the Death Penalty, in *Aikens v. California*, 406 U.S. 813 [No. 68-5027] pp. 6-7.

debatable, but in the instance of murderers it is most certainly untrue."[210]

C. Public Acceptance of the Penalty of Death

Against the background of this evidence that the death penalty is excessive and unserviceable in terms of

[210]KAKOULLIS, THE MYTHS OF CAPITAL PUNISHMENT 2 (*CENTER FOR RESPONSIBLE PSYCHOLOGY, BROOKLYN COLLEGE*, C.U.N.Y., Report No. 13, 1974). *See also* Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703; FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION 31-38 (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972). Indeed, there is strong evidence that the death penalty may service to *incite* murder. It has been reported that in the seventeenth and eighteenth centuries there was an "epidemic of indirect suicides [in Norway and Denmark] . . . when depressed people committed murder in order to be put to death . . . ." *Id.* at 39. In both countries laws were passed specifically exempting such people from the death penalty. "The law passed in Denmark in 1767 abandoned the death penalty in cases where (melancholy and other dimal persons (committed murder) for the exclusive purpose of losing their lives)." *Ibid.* Moreover, there is evidence that even the limited publicity surrounding an execution "has a 'brutalizing' effect on the population that more than offset[s] any deterrent effects" by causing an increase in the incidence of homicide in the periods immediately surrounding executions. BOWERS, EXECUTIONS IN AMERICA 20 (1974). *See also* Glaser & Zeigler, *Use of the Death Penalty v. Outrage at Murder*, 20 CRIME & DELINQ. 333 (1974).

the legitimate goals of the criminal justice system, we ask the Court to look again at the use society has made of it. For although the facts warrant a judicial judgment of excessiveness, the Court need not rely solely on its own appraisal of them. Society itself has pronounced a judgment, by its actions if not by its words. That judgment is that the penalty of death is both excessive and unacceptable.

To be sure, thirty jurisdictions have enacted death-penalty legislation since *Furman* (narrower, in all but two cases, than their pre-*Furman* authorizations of capital punishment).[211] But, in every case, the legislature has preserved or created a wide range of selective mechanisms by which the death penalty can be avoided in most cases. Some States have expressly conferred life-or-death sentencing discretion upon capital juries, to be exercised pursuant to standards that purport to confine such discretion but do not do so in fact.[212] Other States allow escape from "mandatory" death penalties through a variety of preconviction and postconviction outlets like those of North Carolina which we have described in Part II at pp. 45-100 *supra*. In this setting at least, the number of legislative authorizations is not – as *Furman* properly held – an appropriate test of acceptability of a harsh punishment. For acceptability is measured by what an enlightened public conscience will allow the law actually to do, not what it will permit a statute to threaten vaguely.[213] And

[211]See note 15, *supra*; Appendix A, pp. 42a-43a, 55a *infra*.

[212]*See* Petition for Writ of Certiorari, 17 *Eberheart v. Georgia*, No. 74-5174 (filed August 19, 1974) pp. 32-36.

[213]"The objective indicator of society's view of an unusually severe punishment is what society does with it . . . ." *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

[53b]

the authors of even purportedly "mandatory" legislation – legislation written to be administered through discretionary judgments of prosecutors, judges, juries, and the Governor – can hardly be unaware that they are not in fact ordaining death except in a fraction of the cases covered by the statute.[214] Prosecutors may be relied upon to "avoid the unacceptably rigorous application of the letter of the law"[215] by filing and accepting pleas to non-capital charges[216] with the

[214] *Cf.* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1252 (1974):

> "[a]s reported previously, a substantial 59 percent of the public now favors capital punishment in principle. No more than 39 percent of the same persons, however, could say, 'If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty.' Another 16 percent agreed with the statement, 'I could never vote guilty, even if guilt were proven, knowing that the defendant would automatically receive the death penalty.' And a larger percent agreed that, 'I could not say in all cases, even if guilt were proven, that I would vote guilty, knowing the defendant would automatically receive the death penalty.'
>
> Thus, by 49-39 percent, the American people indicate that in actual practice they would individually oppose the automatic imposition of the death penalty if a person were proven guilty of a crime such as murder.
>
> The clear implication of these results is that while people feel that capital punishment is the most effective deterrent to crimes that take the life of other persons, there should be much latitude in the way the death sentence is handed out. The public wants to have the death penalty on the books, but would use it sparingly and by no means as an automatic punishment for a capital crime."

[215] *See* text at note 91 *supra*.

[216] *See* pp. 45-61 *supra*.

acquiescence (where required) of trial judges.[217] Juries can be counted on to make sentencing decisions "under the guise of resolving issues of evidential doubt."[218] At the end of the judicial process, the Governor may be expected to provide "an outlet from the rigorous inflexibility"[219] of "mandatory" capital punishment.

We are left, then, with the history of the past as prelude to the future. What that history shows is a rejection of the death penalty that "could hardly be more complete without becoming absolute."[220] Given a choice of punishing "capital" offenders by death or something less, American systems of criminal justice have chosen against death for all but a scant handful of offenders.

> "Although the number cannot be determined with precision, no one can doubt that in each of the

[217] *See* pp. 57,61 *supra*.

[218] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966). We have seen, indeed, that jury acquittals motivated by a desire to avoid capital punishment under "mandatory" sentencing schemes provided a major impetus for the replacement of those schemes with overtly "discretionary" ones during the late Nineteenth and early Twentieth Centuries. *See* note 133 *supra*. *Cf.* Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32, 35 (1974):

> "[a]ntebellum Americans ... whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men."

[219] *See* text at note 148 *supra*.

[220] *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

> years involved [1930-1959], with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in a capital judgment.
>
> . . . . . .
>
> The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of the culprits whose conduct makes them eligible for its imposition . . . .
>
> [T]his experience reveals a deep reluctance in our culture to employ the final sanction. . . ."[221]

This reluctance "to impose or authorize the carrying out of a death sentence"[222] is the more eloquent because of the context in which it has occurred. For it is fair to say that the conditions of administration of capital punishment during the past several decades have been such as to promote its public acceptability to the fullest extent consistent with its nature and the tenor of the public conscience. In the first place, every American execution since 1936 has taken place in secret, isolated by law from the public eye and

[221]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. F. 249, 252-253 (1961).

[222]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

conscience.[223] Indeed, there are but a handful of people in this Nation who have witnessed an execution and can speak with authority to the proposition that:

> ". . . if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency."[224]

The rarity and secrecy of executions account for the fact that, although it is everywhere agreed that the cruelty of a death sentence is such that its imposition requires extraordinary justification, the wealth of research and theoretical debate on the subject of capital punishment is largely ignored. The often noted fact that ". . . American citizens know almost nothing about capital punishment"[225] reflects two circumstances: we

[223]The first American State to abolish public executions was Pennsylvania, in 1834. *See* Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952). Public execution terminated in England in 1868, *see* TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 20 (1961); and such executions were progressively outlawed in the United States throughout the Nineteenth Century, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 6 (1919). The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 307 (3rd ed. 1959).

[224]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQ. 1, 6 (1969). *See* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong. 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[225]*Furman v. Georgia*, *supra*, 408 U.S. at 362 (concurring opinion of Mr. Justice Marshall) (citing Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465, 466 (1961); KOESTLER, REFLECTIONS ON HANGING 164 (Amer. ed. 1957); and DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257-258 (1962)).

are protected by disuse and by official secrecy from its reality; and, as a consequence, there is no incentive to examine rigorously its justifiability.

But the death penalty also knows a different and less innocent kind of isolation from public consciousness and conscience. It is a fact of human nature that we respond more readily to wrongs committed against those with whom we identify – those most like ourselves in appearance, background and mores. Conversely, wrongs we would not tolerate when done to our own kith or kind are tolerable when inflicted on those we despise or can ignore. The strong extant evidence and observations that the death penalty has been disproportionately applied to racial minorities[226] and to the poor[227] therefore cannot be ignored in

[226]Racial discrimination in the imposition of capital punishment has been borne out in a number of discrete and limited but careful studies. Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). Moreover, it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967); PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT 14-15 (1961); UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 32, 98 (1968); BEDAU, THE DEATH PENALTY IN AMERICA 411-413 (rev. ed. 1967); CLARK, CRIME IN AMERICA 335 (1970); MATTICK, THE UNEXAMINED DEATH 5, 17 (1966); WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS 77, 80-81 (1970); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death*

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Penalty, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); *and see* Rubin, *Disparity and Equality of Sentences – A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967); BOWERS, EXECUTIONS IN AMERICA 71-120 (1974); Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 GEORGIA J. CORRECTIONS 41 (1974). Evidence of discrimination has been equally strong when the sentencing systems under study were ostensibly mandatory:

> "... although we have no empirical evidence that the mandatory death penalty is superior to discretionary sentencing as a deterrent to murder, we have seen that it has been associated with higher levels of execution, with comparable levels of racial discrimination, and, very likely, with reduced levels of capital convictions. In view of this evidence, it would appear that the adoption of the mandatory death penalty would mean a greater sacrifice of human life, continued discrimination against blacks, and the inability to convict some guilty offenders, without any deterrent benefit."

BOWERS, *op. cit. supra*, at 162; *see also* Garfinkel, *supra*.

The following are the total numbers of persons executed between 1930 and 1970, broken down by offense and race, as they appear in UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, *Capital Punishment 1930-1970* 12 (August, 1971):

	Murder	Rape	Other	Total
White	1664(49.9%)	48(10.5%)	39(55.7%)	1751(45.4%)
Negro	1630(48.9%)	405(89.1%)	31(44.3%)	2066(53.5%)
Other	40(1.2%)	2(0.4%)	0(0.0%)	42(1.1%)
	3334 (100%)	455(100%)	70(100%)	3859(100%)

[227]"It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA 335 (1970). See DUFFY & HIRSHBERG, 88 MEN AND 2

(continued)

assessing the quality of such acceptance as the penalty has had. For present purposes, it matters little whether these disproportions are the result of discrimination, passive lack of empathy, inadequacy of defense resources 228, or some more benign explanations. The very fact of the disproportion means that public response

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(footnote continued from proceeding page)

WOMEN 256-257 (1962); LAWES, TWENTY THOUSAND YEARS IN SING SING 302 (1932); LAWES, LIFE AND DEATH IN SING SING 155 (1928); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. No. 2 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964*, 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait*, 15 CRIME & DELINQ. 62 (1969); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132 (1969). *And see* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n.8.

[228]For a review of the disadvantages under which defense of an indigent, low or moderate income person must be conducted, *see* Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218-224 (1964).

to the enormity of the decision to kill a fellow human being is blunted. To the average citizen and the citizen of influence, death remains a penalty for *them*, not for *us*.

. At this point, description of the acceptance of capital punishment by contemporary society becomes appropriately cyclical. For infrequent, racially and socially disproportionate application of the death penalty is maintained by the very attitudes it has helped to create. A harsh penalty, unacceptable in general application, is inflicted on the powerless and the unpopular while more sympathetic and attractive classes of defendants are spared. Thus applied, the residue of the penalty is acceptable to the public, which feels no pressure to restrict its broad availability on the statute books. The broad availability of the penalty in turn creates consistent pressure upon prosecutors, jurors, judges, and Governors, to take advantage of a variety of selective mechanisms to avert the punishment from all but an impotent and anonymous few.

This pattern of use, in turn, makes the justifications of capital punishment even more hollow. Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to serve its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is necessary; as an instrument of retribution, it is inadequate, haphazard, and unjust. The few men whom it kills die for no reason; they are executed "in the name of a theory in which the executioners do not believe."[229] Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."[230]

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[229]Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 141 (Mod. Lib. 1963).

[230]Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3 (1967).

The cycle can be broken only if the Eighth Amendment is employed in its most vital and essential function: to assure that principles of human decency are universally enforced, even – and especially – where rare and random application of a punishment makes their occasional violation virtually invisible except to the condemned.

CONCLUSION

Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the North Carolina Supreme Court should therefore be reversed.

Respectfully submitted,

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Appendix C:

State v. Albert Lewis Carey, Jr., 285 N.C. 50a, 206 S.E. 2d 222 (1974).

285 N.C. 509

STATE of North Carolina

v.

Albert Lewis CAREY, Jr.

No. 19.

Supreme Court of North Carolina.

July 1, 1974.

Defendant was convicted in Superior Court, Mecklenburg County, Sam J. Ervin, III, J., of murder in the first degree and conspiracy to commit armed robbery, and he appealed. The Supreme Court, Lake, J., held, inter alia, that the trial court erred in refusing to allow interrogation of prospective jurors concerning their views with reference to the imposition of the death penalty and in refusing to permit defendant, in his argument to the jury, to inform the jury that the prescribed punishment for first-degree murder was death; that the evidence supported defendant's convictions; that the charge of conspiracy to commit armed robbery was not merged into the murder charge; that the Court did not err in admitting into evidence a box of shotgun shells found by police officers in the kitchen at defendant's home; that it properly allowed the State to introduce evidence of a statement given by defendant even though the existence of that statement was not revealed prior to trial; and that testimony by a witness that he had committed perjury because of beatings and threats by other coconspirators was not inadmissible as hearsay.

New trial.

1. Criminal Law ⇐717

Jury ⇐131(8)

Trial court in first-degree murder prosecution erred in refusing to permit defendant and State to interrogate prospective jurors concerning their views with reference to imposition of death penalty upon one convicted of murder in first degree and in refusing to permit defendant, in his argument to jury, to inform jury that, under law of state, prescribed punishment for murder in first degree was death. G.S. § 14–17.

2. Conspiracy ⇐47(11)

Homicide ⇐234(5)

Convictions for first-degree murder and conspiracy to commit armed robbery were supported by evidence that defendant participated in planning of robbery of service station, during attempted perpetration of which attendant was killed by coconspirator, and was present in automobile in which perpetrators made getaway. G.S. § 14–17.

3. Criminal Law ⇐30

When State proves another felony as element of first-degree murder, such other felony is merged into murder and may not be ground for another separate prosecution and punishment.

4. Criminal Law ⇐30

Where defendant was charged with armed robbery, conspiracy to commit armed robbery and first-degree murder, and first-degree murder charge rested on evidence that filling station attendant was killed by coconspirator during attempted robbery, armed robbery charge, under which defendant otherwise could have been convicted of attempt to commit armed robbery, was properly dismissed as being merged in first-degree murder charge. G. S. § 14–17.

5. Criminal Law ⇐29

Because conspiracy to commit armed robbery was separate offense from attempted robbery, defendant could be convicted of both first-degree murder and conspiracy to commit armed robbery on evidence that filling station attendant was killed by coconspirator during attempted robbery which defendant helped plan. G.S. § 14–17.

6. Conspiracy ⇐27

Conspiracy is completed crime when it is formed, without any overt act necessary to carry it into effect.

7. Criminal Law ⇐394.4(3)
Searches and Seizures ⇐3.3(4)

Where, although police officer had no warrant to search for shotgun shells in defendant's house, he was legally inside house during execution of warrant to arrest defendant and others allegedly implicated in filling station robbery when he saw shotgun shells in plain view in open drawer in kitchen, defendant's constitutional rights were not violated when officer took shells into his possession or when they were introduced into evidence at defendant's subsequent trial. G.S. § 14-17.

8. Indictment and Information ⇐121.2(5)

Where trial of alleged accomplice in attempted filling station robbery which resulted in death of attendant had occurred prior to defendant's trial on charges arising out of same occurrence, and testimony of same witness was foundation of State's case is each prosecution, so that defendant should have been fully aware of theory of State's case against him, trial court did not abuse discretion in refusing defendant's pretrial motion for bill of particulars. G. S. § 15-143.

9. Criminal Law ⇐700

Where prosecutor did not know of existence of oral statement given by defendant to policeman while in custody until trial was under way and thereafter promptly informed defendant's counsel of existence of such statement, trial court did not abuse discretion in admitting such statement into evidence even though it had not been available to defendant's counsel prior to trial. G.S. § 15-155.4.

10. Criminal Law ⇐412(4)

Fact that defendant's voluntary statement, made while in police custody, was made in polygraph testing room was irrelevant to question of its admissibility.

11. Criminal Law ⇐422(6)

Where testimony by State's witness that he had changed his prior testimony because of beatings and threats made by alleged coconspirators of defendant was introduced as bearing on inconsistencies in witness' testimony, not to show truth of fact of beatings and threats, testimony was not objectionable as hearsay because of defendant's absence when beatings and threats occurred.

Under indictments, proper in form, the defendant was convicted of murder in the first degree and of conspiracy to commit armed robbery. Upon the charge of murder, he was sentenced to death and upon the charge of conspiracy to commit armed robbery, he was sentenced to 10 years in the State's prison, less credit for time he was in jail pending trial.

The defendant was also indicted for armed robbery. The three cases were consolidated for trial. At the close of the State's evidence, a judgment of nonsuit was entered upon the charge of armed robbery, the defendant's motions for like judgments on the other two charges being denied. The defendant gave notice of appeal in the two cases in which sentences were imposed. Certiorari was granted to bring to this Court, prior to determination by the Court of Appeals, the appeal from the judgment in the conspiracy case and the two appeals were heard together.

Prior to the bringing of any prospective jurors into the courtroom, the trial court stated that it would not permit the State or the defendant, "in questioning the jurors or in the course of the trial to indicate in any way that the punishment for first degree murder upon the present case law in North Carolina is death." At the conclusion of all the evidence, prior to argument of counsel, the court directed that counsel not argue the question of the death penalty or show to the jury portions of certain exhibits containing reference to the death penalty. To each of these directions the

defendant objected and excepted in due time. Each such direction of the court was complied with by counsel and the record discloses that at no time was any reference to the death penalty made in the presence of prospective jurors or in the presence of the empaneled jury.

The theory of the State's case was that the defendant, his brother, Anthony Carey, James Calvin Mitchell and two others, planned and conspired to rob with firearms the operators of a filling station, that the defendant, for the purpose of carrying out this design, transported in his or his wife's automobile, Mitchell and another of the conspirators to a point near the filling station and there waited for their return, Mitchell and his companion went to the filling station and, in an unsuccessful attempt to accomplish the intended robbery, shot one of the operators, James Sloop, in the abdomen with a sawed-off shotgun, supplied to Mitchell by the defendant, and fled from the scene back to the automobile in which the defendant then transported them back to their homes, after they reported to him what had occurred at the filling station. The evidence of the State, if true, fully supports the theory of the State and the verdicts of the jury finding the defendant guilty both of the conspiracy and of the murder.

Robert Morgan, Atty. Gen., and John R. B. Mathis, Asst. Atty. Gen., Raleigh, for the State.

Waggoner, Hasty & Kratt by John H. Hasty, Charlotte, for defendant.

LAKE, Justice.

[1] It was clearly error for the trial judge to refuse to permit the defendant (and the State) to interrogate prospective jurors concerning their views with reference to the imposition of the death penalty upon one convicted of murder in the first degree, and also error to refuse to permit the defendant, in his argument to the jury, to inform the jury that, under the law of this State, the prescribed punishment for murder in the first degree is death. State v. Carey, N.C., 206 S.E.2d 213, decided this day; State v. Britt, 285 N.C. 256, 204 S.E. 2d 817. Because of these errors there must be a new trial of the defendant. The jury not having been selected in accordance with the requirements of the law, there must be a new trial on the conspiracy charge as well as upon the murder charge.

[2] The defendant's contention that his motion for judgment of nonsuit should have been allowed as to both charges has no merit as to either. In State v. Fox, 277 N.C. 1, 17, 175 S.E.2d 561, we said: "[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree." See also: State v. Carey, supra; State v. Bell, 205 N.C. 225, 171 S.E. 50.

This is a companion case to State v. Carey, supra, the two defendants being brothers and alleged co-conspirators. The evidence for the State concerning the conspiracy to rob and the fatal shooting of the filling station attendant was substantially the same in both cases. Reference is made to our opinion in that case for a more complete narration of the facts. For the present, it is sufficient to state that the testimony of Mitchell, the trigger man at the shooting, is ample to support a finding that he, the two Carey brothers, Harold Givens and Antonio Dorsey conspired to rob Williams' Exxon Service Station; that this defendant—Albert Lewis Carey, Jr.—was the principal planner of the robbery; that, in his own or his wife's automobile, he transported all of the conspirators to a point near the filling station where he let Mitchell and Givens out for the purpose of perpetrating the planned robbery; that they went to the filling station and, in an attempt to carry out the plan, Mitchell fatally shot James Sloop, an attendant thereat; following the shooting, Mitchell and Givens fled and were picked up by this de-

fendant and transported back to their homes in his automobile.

A murder perpetrated in an attempt to commit robbery is murder in the first degree. G.S. § 14-17; State v. Fox, supra.

[3-6] As the defendant contends, when the State proves another felony, as an element of first degree murder, such other felony is merged into the murder and may not be the ground for another, separate prosecution and punishment. State v. Moore, 284 N.C. 485, 202 S.E.2d 169; State v. Carroll, 282 N.C. 326, 193 S.E.2d 85; State v. Peele, 281 N.C. 253, 188 S.E. 2d 326. For this reason, the trial court properly allowed the motion for judgment of nonsuit upon the charge of armed robbery, under which the defendant, otherwise, could have been convicted of an attempt to commit armed robbery. This well settled principle of law does not, however, prevent the trial and conviction of the defendant both on the charge of first degree murder and on the charge of conspiracy to rob. The conspiracy is a separate offense from the attempt to rob. The conspiracy is a completed crime when it is formed, without any overt act designed to carry it into effect. State v. Goldberg, 261 N.C. 181, 202, 134 S.E.2d 334; State v. Brewer, 258 N.C. 533, 539, 129 S.E.2d 262; State v. Davenport, 227 N.C. 475, 494, 42 S.E.2d 686. The conspiracy and the accomplishment or attempt to accomplish the intended robbery are separate offenses and the conspirators may be convicted of both and punished for both. State v. Brewer, supra, 258 N.C. at p. 558, 129 S.E.2d 262. In the present case, the murder occurred in the perpetration of the attempt to rob. It is this felony, not the separate offense of conspiracy, which was merged into the charge of first degree murder.

Consequently, there was no error in the denial of the motion for judgment of nonsuit as to either charge, no error in the instruction to the jury that it might find the defendant guilty of conspiracy and also guilty of murder in the first degree, and no error in the imposition of the prescribed punishment for each offense.

[7] The defendant contends that the court erred in admitting into evidence a box of shotgun shells found by Officer Stroud in the kitchen of the defendant's home. We find no merit in this contention.

The court conducted a voir dire upon the defendant's motion to suppress this evidence. It found as facts: At 2 a. m. on 10 July 1973, ten police officers, under the command of Lieutenant Stroud, went to the residence of the sister of the defendant; that the officers had warrants for the arrest of this defendant, his brother, Anthony Douglas Carey, Harold Givens and Antonio Dorsey; these arrest warrants charged each of these individuals with murder and the purpose of the officers' going to the house was to arrest the Carey brothers on those warrants; at that time, the officers also had information indicating that Antonio Dorsey might be physically present in the residence and they also had the purpose of arresting him pursuant to the warrant so charging him; arriving at the residence, they knocked at the door and stated that they were looking for the Carey brothers and had warrants for their arrest; they were admitted to the residence by the sister of the defendant, whose residence it was, and advised by her that the brothers were upstairs asleep; the officers went upstairs, found the Carey brothers asleep in separate rooms, arrested both of them and searched the rooms in which they were arrested in an unsuccessful effort to find the shotgun used in the perpetration of the murder; Lieutenant Stroud then examined other parts of the house to determine whether Antonio Dorsey was present on the premises; returning downstairs he went to the door of the kitchen, he being the first officer to enter the kitchen; arriving at the door of the kitchen, he observed a drawer open and in the open drawer, he standing in the doorway, observed the box of shotgun shells, which he then took into his possession; at the

time the shells were so discovered, the officer did not have any information that shotgun shells were in the house and he was not looking for these but was seeking the whereabouts of Antonio Dorsey; that his observance of the box of shells was inadvertent; that Lieutenant Stroud was lawfully inside the residence pursuant to the arrest warrants and had a lawful right to be where he was when he observed the shotgun shells which were in plain view as he stood at the door of the kitchen.

The evidence on voir dire was ample to support these findings of fact, although there was conflicting evidence as to whether the shells were in plain view of one standing in the doorway and as to whether other officers had previously been into the kitchen. The findings of fact, being supported by the evidence on voir dire, are conclusive. State v. Grant, 279 N.C. 337, 182 S.E.2d 400; State v. Belk, 268 N.C. 320, 150 S.E.2d 481; Stansbury, North Carolina Evidence (Brandis' Revision), § 121a, p. 378. The box of shells having been in plain view of the officer as he stood where he had a right to be and having been observed by him inadvertently, not as the result of a search therefor, there was no violation of the defendant's constitutional rights in the officer's taking them into his possession, or in their introduction into evidence. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067. See also: Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, the plurality opinion of Justices Clark, Black, Stewart and White; Stansbury, North Carolina Evidence (Brandis' Revision), § 121a, p. 372.

[8] The defendant, prior to trial, moved for a bill of particulars, which motion was denied. In this there was no error. The allowance of a motion for a bill of particulars rests in the sound discretion of the trial court. G.S. § 15-143; State v. Overman, 269 N.C. 453, 468, 153 S.E.2d 44; State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54; State v. Scales, 242 N.C. 400, 87 S.E.2d 916. The trial of Anthony Douglas Carey had occurred prior to the trial of this defendant. There also, the testimony of Mitchell was the foundation of the State's case. Thus, at the time the present defendant was placed on trial, he should have been fully aware of the theory of the State's case against him.

[9] Prior to the commencement of the trial, the defendant, pursuant to G.S. § 15-155.4, moved that the State be required to make available to the defendant's counsel exhibits proposed to be used by the State at the trial and copies of all written statements or summaries of oral statements of the defendant to the solicitor, the police or other persons. Such order was entered, including the following:

> "9. The State shall inform the defendant's attorney whether or not the defendant has given any statement to the police or Solicitor and furnish a copy of any such written statement to the defendant's attorney or the name of any person to whom any oral statement may have been given."

The solicitor, prior to trial, responded:

> "9. The State provided the defense attorney a copy of all statements by the defendant and a summary of all oral statements given by the defendant."

After the trial was in progress, the solicitor learned that the defendant, having been given the full Miranda warning, signed a waiver of his constitutional rights to which such warning relates and made an oral statement to the police officer in charge of the polygraph testing room. When the solicitor proposed to offer such statement in evidence, defendant's counsel objected and the judge conducted a voir dire in the absence of the jury. Upon such voir dire the solicitor and the defendant's counsel advised the court that, at approximately 6:00 p. m. on the previous day, the solicitor brought these matters to the attention of the defendant's counsel, the solicitor having had no knowledge of them until the night before that.

Evidence for the State on the voir dire was to the following effect: The defendant, after having been given the Miranda warning and having signed the waiver of such rights, consented to the taking of a polygraph test and was carried to the room used for such tests. Proceedings introductory to the taking of a polygraph test were begun but the taking of the test was discontinued and the idea was abandoned when the officer in charge of the test room found the defendant was under the influence of drugs and not in condition to take the test. The following day he was taken back to the polygraph room for such a test, having again been given the Miranda warning of his constitutional rights and having again waived those rights in writing, including the right to have an attorney present at the taking of the polygraph test. Upon arrival in the polygraph test room the defendant stated to the officer in charge thereof that he did not wish to take a polygraph test but desired to make a statement to that officer. Accordingly, no polygraph test was taken. While still in the polygraph testing room the defendant, told the officer in charge thereof that he, the defendant, had planned, with Dorsey, Givens and Mitchell, to rob the filling station, that he had transported these three men to the vicinity of the filling station in his wife's car and there let them out of the car. These statements were overheard by two other officers who had given the defendant the above mentioned warnings and had brought him to the polygraph testing room, after which they had gone into an adjoining room where they could observe the proceedings through a two-way mirror and hear what was said. The defendant had been advised of the existence of such room and its facilities, but did not actually know the two officers were therein.

The defendant testified on the voir dire that he made no such statement to any officer.

At the conclusion of the voir dire, in the absence of the jury, the court made detailed findings of fact, including findings that the defendant made the statement, that it was made voluntarily and spontaneously and was not the result of or induced by any questioning of the defendant, that it had no connection with the polygraph examination and that it was not tainted by anything done in connection with the activities of the officer in charge of the polygraph testing room.

Thereupon the court concluded that the evidence as to the statement was competent but directed that the State should not, on direct examination, elicit any testimony indicating that the statement occurred in connection with an attempt to conduct a polygraph examination.

Thereupon, in the presence of the jury, the officer in charge of the polygraph testing room testified that the defendant made the said statement to him and the other two officers testified that they overheard it. On direct examination of these witnesses no reference was made to a polygraph test or to the fact that the statement was made in the polygraph testing room or that the officers had any duties in connection with such room or tests. On cross-examination by the defendant's counsel it was developed that the statement was made in the polygraph testing room. On redirect examination it was developed that, at the time of making these statements, the defendant had said that he did not care to take the polygraph test but wished to make a statement to the officer, this being the statement in question.

We perceive no error in the ruling permitting the police officers to testify as to the statement so made by the defendant.

G.S. § 15–155.4 provides that, for good cause shown, the judge assigned to hold the courts of the district wherein the case is pending, or the resident superior court judge of the district, shall direct the solicitor to produce for inspection, examination, copying and testing by the defendant or his counsel "any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the

accused to prepare his defense." This statute does not specifically declare inadmissible any exhibit or any oral statement not so exhibited or called to the attention of counsel for the defendant. The expressed and clear purpose of the statute is to give to the defendant's counsel notice of such matters in sufficient time to avoid his being taken by surprise. State v. Davis, 282 N.C. 107, 191 S.E.2d 664.

In the present instance, it is not denied that the solicitor has acted in good faith, he, himself, having had no notice of the statement in question until after the trial was under way and, having informed the defendant's counsel thereof on the day before the statement was offered in evidence. Under these circumstances, the admission of such evidence lies in the sound discretion of the trial court.

[10] In State v. Foye, 254 N.C. 704, 120 S.E.2d 169, this Court held that the results of a polygraph test are not admissible in evidence to establish the guilt or innocence of one accused of a crime. That rule has no application to the present case. The testimony concerning the statement made by the defendant to the officer in charge of the polygraph testing room was not the result of any polygraph test nor was it made in the course of the taking of a polygraph test. The fact that this statement, found by the court upon competent evidence on voir dire to have been made voluntarily, was made in the polygraph testing room is irrelevant on the question of its admissibility. Furthermore, it was the defendant, not the State, who brought to the attention of the jury the fact that the statement was made in that room.

[11] Mitchell, the key witness for the State, testified in detail as to the conspiracy, the attempt to carry out the planned robbery and the fatal shooting in the course of such attempt. He then testified that he had previously testified at the trial of Anthony Douglas Carey and the later trial of Harold Givens and had not "testified the same thing both times." On cross-examination, he testified that in the trial of Harold Givens, one week earlier, he had testified directly contrary to his present testimony and that he had given to Harold Givens a signed statement that "what I am saying on the stand today is a lie." On redirect examination, over objection by the defendant, Mitchell testified that his inconsistent testimony in the previous trial of Givens and his said signed statement were the result of his having been beaten and threatened by Givens and Dorsey while they were all together in jail awaiting the trial of Givens following the trial of Anthony Douglas Carey. The ground of the defendant's objection was that the threatening statements to Mitchell were not made in the presence of the defendant. There is no merit in this objection. The testimony at this trial by Mitchell was not hearsay. It was not offered to show the truth of the threatening statements to him by Givens and Dorsey but to show the fact of those statements having been made and the bearing of that fact upon his inconsistent testimony at the three trials. This was his own in-court testimony as to why he had testified inconsistently at a former trial of another defendant. Mitchell was, of course, subject to cross-examination by this defendant in this trial concerning this and other aspects of his present testimony. We have examined other contentions of the defendant concerning the admissibility of evidence and find no merit therein. No purpose would be served by a discussion of these matters in detail.

For the error of the trial court in the matter of the interrogation of prospective jurors and in the limitation of the argument of defendant's counsel, there must be a new trial, but there is no merit in the other contentions presented by the defendant on this appeal.

New trial.

Appendix D:

State v. Anthony Douglas Carey, 285 N.C. 497, 206 S.E. 2d 213 (1974).

Serve-Pro first took the items to another cleaner which did not do a satisfactory job of cleaning and that the shrinkage occurred there. Defendant points out that the record contains no admission that the items were sooty when delivered to it; that the drapes and spread were neither measured before they left the Wagoner home nor at the time they were delivered to defendant, "sometime in December 1971."

The shrunken items were gone from the Wagoner residence "approximately a week"—not an unreasonable time for cleaning accessories of such size, bulk, and nature. Since defendant was paid for cleaning the items it is a fair inference that it did clean them and that they needed cleaning.

[3, 4] Conceding that the possibilities which defendant suggests do exist, we think plaintiff's evidence raises no question to which defendant cannot supply the answer. Presumably an expert dry cleaner could tell whether drapes and a spread which had taken a blast of soot from a furnace came to it for cleaning *after* they had been exposed to rain or *after* another cleaner had attempted unsuccessfully to restore them. In our view, nothing else appearing, the more reasonable probability is that Serve-Pro took the items directly from the Wagoner residence to defendant's dry cleaning establishment and delivered them in an unshrunken condition. *See* Wilkerson v. Clark, 264 N.C. 439, 141 S.E.2d 884 (1965) and cases cited therein; 3 Strong's N.C. Index, Evidence § 21 (1967). On a motion for a directed verdict the evidence must be interpreted most favorably to plaintiff, and if it is of such character that reasonable men may form divergent opinions of its import, the issue is for the jury. Stewart v. Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971); Corum v. Tobacco Co., 205 N.C. 213, 171 S.E. 78 (1933).

We hold that the motion for a directed verdict was improperly granted. The decision of the Court of Appeals is reversed with directions that the case be remanded to the Superior Court for a trial *de novo*.

Reversed.

285 N.C. 497
STATE of North Carolina
v.
Anthony Douglas CAREY.
No. 16.

Supreme Court of North Carolina.
July 1, 1974.

Defendant was convicted in Superior Court, Mecklenburg County, Sam J. Ervin, III, J., of conspiracy to commit armed robbery and of first-degree murder, and he appealed. The Supreme Court, Huskins, J., held, inter alia, that the evidence was sufficient to make out a prima facie case on both charges despite the fact that defendant did not himself participate directly in the killing of a service station attendant during the attempted robbery; that the State was not required to establish the existence of the conspiracy by independent proof before evidence of the conspiracy from a coconspirator could be introduced, and that it was error for the trial judge to deny the solicitor and defense counsel the right to examine prospective jurors concerning their moral or religious scruples and attitudes toward capital punishment and to preclude mention of the death penalty during cross-examination of a coconspirator.

New trial

1. Conspiracy ⇐40.1

Since gravamen of offense of conspiracy is agreement or union of wills for unlawful purpose, active participation in planned criminal activity is not required to establish guilt.

2. Conspiracy ⇐48.1(2)

Evidence was sufficient to make out prima facie case of conspiracy such as would withstand motion for judgment of nonsuit despite fact that it did not show that defendant had actually participated in attempt to rob filling station, but showed only that he had been present when robbery plans were made and was also present in automobile in which perpetrators made getaway.

3. Homicide ⇐29

When conspiracy is formed to commit robbery or burglary and murder is committed by any of conspirators in their attempt or perpetration of crime, each and all of conspirators are guilty of murder in first degree.

4. Homicide ⇐234(5)

Defendant's conviction of first-degree murder was supported by evidence that although he did not participate in actual attempted robbery of filling station, during which attendant was killed by one of robbers, he had been present when plans for robbery were made and was present in automobile in which perpetrators made their getaway.

5. Criminal Law ⇐427(2)

Existence of conspiracy must be established by evidence aliunde in order for acts and declarations of one conspirator, in furtherance of common design, to be competent against others.

6. Conspiracy ⇐47(1)

Although jury should receive and act upon such testimony with caution, unsupported testimony of coconspirator is sufficient to support conviction for conspiracy.

7. Criminal Law ⇐506(1)

In prosecution for first-degree murder and conspiracy to commit armed robbery, State was not required to establish existence of conspiracy by independent proof before evidence of conspiracy from coconspirator could be introduced.

8. Jury ⇐127, 137(1)

Defendant has right to reject any juror for cause or within limits of his peremptory challenges before panel is completed. G.S. §§ 9-15(a), 9-21(a).

9. Jury ⇐131(8)

Solicitors in capital cases may ask prospective jurors whether they have moral or religious scruples against capital punishment and, if so, whether they are willing to consider all penalties provided by law or are irrevocably committed to vote against verdict carrying death penalty regardless of facts and circumstances that might be revealed by evidence. G.S. §§ 9-15(a), 9-21(a).

10. Jury ⇐131(8)

In prosecution for first-degree murder, it was error for trial judge to deny solicitor and defense counsel right to examine prospective jurors concerning their moral or religious scruples, beliefs and attitudes toward capital punishment, and such action deprived both State and defendant of right to exercise intelligently their peremptory challenges and their challenges for cause.

11. Witnesses ⇐372(1)

Cross-examination of opposing witness to show his bias or interest is substantial legal right which trial judge can neither abrogate nor abridge to prejudice of cross-examining party.

12. Witnesses ⇐372(1)

While trial judge has discretionary power to confine cross-examination within reasonable limits, such power does not include authority to exclude altogether questions, and answers thereto, which directly

challenge disinterestedness or credibility of witness' testimony.

13. Witnesses ⇐372(2)

Where question of credibility and bias of alleged accomplice who testified against defendants in first-degree murder prosecution was of vast importance in case, trial court erred in prohibiting mention of death penalty during cross-examination of accomplice, who had been charged with first-degree murder but had been convicted of second-degree murder pursuant to plea bargain.

Defendant was tried upon bills of indictment, consolidated for trial, charging (1) armed robbery, (2) conspiracy to commit armed robbery, and (3) first degree murder. The armed robbery charge was dismissed at the close of the State's evidence. Defendant was convicted on the two remaining charges and we allowed his petition to bypass the Court of Appeals in the conspiracy case to the end that both convictions might be reviewed by the Supreme Court.

The jury was selected in obedience to an instruction by the trial judge that neither the solicitor nor defense counsel should mention the fact on voir dire examination of the jurors that this was a capital case requiring imposition of the death penalty upon a verdict of guilty of first degree murder.

The State's evidence tends to show that on 18 June 1973 Albert "Butch" Carey was driving his wife's Buick Electra 225 automobile in which his younger brother Anthony Carey (defendant in this case), James Calvin "Peanut" Mitchell and Antonio Dorsey were riding. The car was driven down Trade Street and through the intersection of Trade and Cedar Street where the passengers observed Raymond B. Williams in the process of closing his Exxon service station. Butch Carey said at that time: "That's the man right there that we're going to get the money from. We need someone who is not scared." In the discussion which followed, defendant Anthony Carey stated that he would not go into the service station because his picture and fingerprints were on record at the Charlotte Police Department. Butch Carey suggested that Harold Givens was not afraid and would be willing to commit the robbery with Peanut Mitchell. Harold Givens was picked up at his home and the proposed armed robbery was outlined to him. It was then decided that it would be better to postpone the robbery for one day, and the occupants of the car were returned to their various homes.

The next day, 19 June 1973, Butch Carey and defendant Anthony Carey assembled the same group. Butch Carey was driving the car, and they first picked up Peanut Mitchell followed by Harold Givens and Antonio Dorsey. Butch Carey drove the car to a point approximately three blocks from the scene of the proposed robbery and parked. While riding along Anthony Carey said: "There's a whole lot of money in there, and we can get a whole lot of money from him." It was about 6:30 p. m. Peanut Mitchell and Harold Givens left the car while the others remained in it and waited for their return. Mitchell carried with him a 20-gauge sawed-off shotgun which had been furnished by Butch Carey. Mitchell and Givens went to the service station where Givens entered and bought a soft drink while Mitchell remained outside near the restroom. Givens gave a pre-arranged signal to Mitchell who then came to the front of the service station where he pointed the gun at Raymond B. Williams, the owner, who was preparing to close the station and leave with the day's receipts. Mitchell ordered Mr. Williams to give him the money. Mr. Williams said nothing, but James D. Sloop, who had been employed by Mr. Williams for thirty-seven years, and who was on the scene at the time, said, "I wouldn't give you anything." Peanut Mitchell then fired the shotgun at Mr. Sloop as a result of which Mr. Sloop's

stomach was blown open, his intestines fell out and were supported by the interlaced fingers of Mr. Sloop's hands. Numerous internal organs were perforated and damaged and there was profuse bleeding. Mr. Sloop was taken to the hospital where extensive surgery was undertaken. He lived thirteen days, dying on 3 July 1973 from infection caused by perforation of the digestive organs.

After the gun was discharged both Givens and Mitchell fled without getting the money or anything else. They were picked up by the Carey automobile and all the occupants were returned to their various homes. The attempted robbery took place between 6:30 and 7:00 p. m. on 19 June 1973.

James Calvin "Peanut" Mitchell was fifteen years and seven months old and had completed the ninth grade in school at the time Mr. Sloop was murdered. He was allowed to plead guilty to second degree murder and testified as a witness for the State, his sentence being deferred until after the trial of his co-defendants. On a voir dire hearing in the absence of the jury, the trial court instructed defense counsel that cross-examination of Mitchell with regard to the plea-bargaining would be permitted in the presence of the jury but that no mention was to be made of the death penalty which might have been imposed upon Mitchell for a first degree murder conviction.

Mitchell testified that he, Butch Carey, Anthony Carey and Antonio Dorsey planned the service station robbery prior to the date it was attempted; that he was in the company of Anthony and Butch Carey on the 18th of June from late morning until approximately 6 p. m.; that he met with Butch and Anthony Carey between 4 and 5 p. m. on 19 June 1973 and rode around with them for about two hours, passing the Exxon station five or six times; that he originally was charged with first degree murder of Mr. Sloop, pled guilty to second degree murder and had not been sentenced. He said he told Officer H. R. Thompson about the Exxon station robbery and signed a written statement containing the same information he had already related, and after giving the statement he accompanied Officer Fesperman to the Exxon service station and showed the officer "the way that I had run from the station and the path which I took in leaving the station. I also showed Officer Fesperman where I reloaded the shotgun."

The State offered in evidence a written waiver of rights and waiver of counsel signed by Anthony Carey dated 11 July 1973 at 3:15 p. m. (State's Exhibit 8) together with Anthony Carey's written statement bearing the same date and indicating it was finished at 4:10 p. m. The pertinent portion of the statement concerning the murder of James Sloop reads as follows:

"Sometime just before the man got shot down at the Exxon Station, we all, Butch, me, and James Mitchell, and Tony Dorsey, and Harold Givens, were in Butch's car. We were all in the car together. I believe Harold ask me to go with him to rob the man and I told him I wasn't going. Harold or Peanut (James Mitchell), one of them, asked Tony if he would go and Tony told them he wasn't going. Tony said he wasn't going because Peanut accused Tony of being scared and Tony made some kind of remark back to Peanut. We went out West Trade Street to Cedar Street there at the station (Exxon Station), then we went to the next corner and went across 5th Street and we went up a little bit. We let Peanut and Harold out of the car. ~~Peanut had the gun.~~ (HRT) (AC) We let them out on Cedar Street. Peanut said when they finished the job that they were going to run back down Cedar Street—indicating the Fifth Street area. He said 'If you all don't find me, I will be in the Fairview Homes.' We then rode on down by the cemetery on Kates Street. We came back to Trade Street and went across Trade Street and went

back by the service station. We saw Peanut standing by the bathroom on the side at the station and Harold was going toward the drink box to get a drink. We turned left on Cedar Street and went to 5th to the traffic light and we saw Peanut and Harold running behind the service station. Before this we had heard a shot. Then we turned left on Fifth Street and we lost Peanut and Harold and we went on to Sycamore Street. We came back and hit Irwin Avenue and we saw Peanut coming down behind the building that sits on the corner of Fifth and Irwin, and we stopped and picked up Peanut and Harold. We went right on Fifth and went toward Johnson C. Smith University and went to Grant Street. In the meantime, we had heard the shot and when they got into the car, we were all kind of scared. Nobody said anything about this until we got back home on Grant Street. I asked Peanut why he shot the man and he said something like 'He was trying to be like all the rest, they want to go for their gun.' Harold said that he didn't get the money because 'I saw all that blood and got scared and ran.'"

Defendant testified in his own behalf. He stated that he did not participate in the robbery of the Exxon station where Mr. Sloop was shot and did not help anybody plan that robbery. He said: "I never encouraged anyone to commit that robbery. I had no knowledge of the crimes which were being committed by Peanut Mitchell until later in the month of June when his activities became common knowledge in my community. I had no knowledge of the Exxon service station robbery prior to the time the robbery took place."

Other witnesses testifying for the defendant placed him elsewhere from late evening on 18 June 1973 until 7 p. m. on 19 June 1973. No alibi evidence was presented with respect to the period of time when the robbery was planned on 18 June 1973, but defendant denied any participation in the planning or commission of the attempted robbery and denied that he was with the alleged co-conspirators on either of the days in question.

Defendant was convicted of conspiracy to commit armed robbery and first degree murder. He received ten years on the conspiracy charge and was sentenced to death for first degree murder. Both cases are now before the Supreme Court for appellate review. Errors assigned are discussed in the opinion.

Robert Morgan, Atty. Gen., James F. Bullock, Deputy Atty. Gen., and Raymond W. Dew, Jr., Asst. Atty. Gen., Raleigh, for the State of North Carolina.

Gene H. Kendall, Charlotte, for defendant appellant.

HUSKINS, Justice:

The action of the trial court in overruling defendant's motion for judgment of nonsuit in the conspiracy case constitutes his first assignment of error.

"A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means. The conspiracy is the crime and not its execution." State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964), and cases cited therein; *accord*, 16 Am.Jur.2d, Conspiracy § 1 (1964). "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete." State v. Knotts, 168 N.C. 173, 83 S.E. 972 (1914).

Viewed in the light most favorable to the State, the evidence shows that defendant, Peanut Mitchell, Harold Givens, Antonio Dorsey, and defendant's brother Butch Carey were together on 18 June 1973 when the robbery was planned. As they drove past the Exxon station on that date Butch Carey said: "That is the man right there we are going to get the money from. We need someone who is not scared." Peanut Mitchell suggested that defendant go with

him to rob the station. Defendant rejected the suggestion because the Charlotte Police had his photograph and fingerprints on file. The same group re-assembled on 19 June 1973 and, just prior to the actual robbery attempt, defendant said: "It's a whole lot of money in there, and we can get a whole lot of money from him." During the robbery attempt defendant remained in the car with Butch Carey and Antonio Dorsey, awaiting the return of the robbers with the fruits of the crime. He was a willing participant in the scheme.

[1] Since the gravamen of the offense of conspiracy is the agreement or union of wills for the unlawful purpose, active participation in the planned criminal activity is not required to establish guilt. "A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude toward an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime." 16 Am.Jur.2d, Conspiracy § 15 (1964).

In State v. Turner, 119 N.C. 841, 25 S.E. 810 (1896), we said that "[t]hose who aid, abet, counsel *or encourage*, as well as those who execute their designs, are conspirators. . . ." (emphasis added) In State v. Andrews, 216 N.C. 574, 6 S.E.2d 35 (1939), responding to a contention similar to that advanced by this defendant, we said: "The fact that the appealing defendant did not personally participate in the overt act is not material if it be established by competent evidence that he entered into an unlawful confederation for the criminal purpose alleged."

[2] In light of these legal principles, we hold the evidence is sufficient to make out a *prima facie* case of conspiracy and to withstand the motion for judgment of nonsuit.

By like reasoning, defendant argues that since he did not actively participate in the armed robbery attempt he is not criminally responsible for the murder committed in that attempt. Denial of his motion to nonsuit the murder case is assigned as error.

"Those who enter into a conspiracy to violate the criminal laws thereby forfeit their independence, and jeopardize their liberty, for, by agreeing with another or others to engage in an unlawful enterprise, they thereby place their safety and freedom in the hands of each and every member of the conspiracy." State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951).

"The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, *every party* to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design." 1 Wharton's Criminal Law and Procedure § 251 (1957) (emphasis added). *Accord*, 40 Am.Jur.2d, Homicide §§ 34-35 (1968); 40 C.J.S. Homicide § 9e(1) (1944). For a more general statement of the same principle, see State v. Kelly, 243 N.C. 177, 90 S.E.2d 241 (1955); State v. Smith, 221 N.C. 400, 20 S.E.2d 360 (1942); State v. Williams, 216 N.C. 446, 5 S.E.2d 314 (1939); 16 Am.Jur.2d, Conspiracy § 14 (1964).

[3] The following statement from State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970), is in agreement with the general rule and is most appropriate here: "[W]hen a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all

of the conspirators are guilty of murder in the first degree." *Accord*, State v. Bell, 205 N.C. 225, 171 S.E. 50 (1933).

[4] Application of the foregoing principles to the evidence in this case leads inexorably to the conclusion that defendant's motion for judgment of nonsuit in the murder case was properly denied. The evidence makes a case for the jury. Defendant's first assignment of error is overruled.

Defendant contends the trial court erred in allowing James Calvin Mitchell, alleged co-conspirator, to testify to defendant's involvement in the conspiracy. Defendant argues that the State is required to establish the existence of the conspiracy by independent proof before evidence of the conspiracy from a co-conspirator can be introduced.

The principles defendant urges us to apply in this case were stated in State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969), as follows:

"The general rule is that when evidence of a prima facie case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. State v. Gibson, 233 N.C. 691, 65 S.E.2d 508; State v. Smith, 221 N.C. 400, 20 S.E.2d 360; 16 Am.Jur.2d, Conspiracy, §§ 35, 36, 37, 38, pp. 146, 147 (citing authorities). Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. State v. Dale, 218 N.C. 625, 12 S.E.2d 556; State v. Lea, 203 N.C. 13, 164 S.E. 737; 11 Am.Jur. 571. Of course a different rule applies to acts and declarations made before the conspiracy was formed or after it terminated. Prior or subsequent acts or declarations are admissible only against him who committed the acts or made the declarations."

[5] Defendant seeks to apply a sound principle of law to an ineligible state of facts. Of course, the existence of a conspiracy must be established by evidence *aliunde* for the *acts and declarations* of one conspirator, in furtherance of the common design, to be competent against the others. State v. Benson, 234 N.C. 263, 66 S.E.2d 893 (1951); State v. Blanton, 227 N.C. 517, 42 S.E.2d 663 (1947); 2 Strong's N.C. Index 2d, Conspiracy § 5 (1967). This rule, however, affords this defendant no solace because this case does not involve the use of *acts and declarations* of one conspirator against another. Rather, it involves the *sworn testimony* of one conspirator against another.

[6] It is seldom that the State can show the existence of a conspiracy by direct proof, but when the testimony of a co-conspirator is available it is competent to establish the conspiracy. State v. Summerlin, 232 N.C. 333, 60 S.E.2d 322 (1950). A co-conspirator is an accomplice and is always a competent witness. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334 (1964); 16 Am.Jur.2d, Conspiracy § 41 (1964). It has been held in many cases that the unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969), cert. denied, 398 U.S. 959, 90 S.Ct. 2175, 26 L.Ed.2d 545 (1970). *See* State v. Tilley, 239 N.C. 245, 79 S.E.2d 473 (1954); State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

[7] Under applicable principles of law James Calvin Mitchell was a competent witness to testify to the conspiracy. Defendant's second assignment of error is overruled.

Prior to arraignment the trial judge instructed the solicitor and defense counsel that the fact that this was a capital case or

that the death penalty might be imposed should not be mentioned in the presence of the jury. Defendant objected to this instruction and now assigns it as error. He contends that denial of his right to question prospective jurors concerning their views on capital punishment or to inform them of the punishment prescribed by law upon a verdict of guilty of first degree murder was prejudicial and requires a new trial.

[8] The basic concept in jury selection is that each party to a trial has the right to present his cause to an unbiased and impartial jury. State v. Spence, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968). "A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed." State v. McKethan, 269 N.C. 81, 152 S.E.2d 341 (1967).

"Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor." 50 C.J.S. Juries § 280a (1947). *Accord*, State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951); 47 Am.Jur.2d, Jury § 233 (1969). G.S. § 9-21(a) confers upon each defendant in a capital case the right to challenge fourteen jurors "peremptorily without cause."

In State v. Allred, supra, we quoted with approval the following passage from State v. Brooks, 57 Mont. 480, 188 P. 942 (1920): "The *voir dire* examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law." The quoted passage vividly reveals the crucial relationship between voir dire examination of prospective jurors and challenges, both peremptory and for cause. The right to make inquiry as to the fitness and competency of any person to serve as a juror is vouchsafed by G.S. § 9-15(a) which provides: "The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged." The extent of the inquiries, of course, is subject to the control and supervision of the trial judge. State v. Harris, 283 N.C. 46, 194 S.E.2d 796 (1973); State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972).

[9] Since decision of the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), we have held in many capital cases that solicitors may ask prospective jurors whether they have moral or religious scruples against capital punishment; if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence. See State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970).

This right of inquiry concerning a prospective juror's competency and fitness to serve may, of course, be exercised by or on behalf of the defendant as well as the State. "In order to insure a fair trial be-

fore an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment." State v. Crowder, supra.

[10] Applying the foregoing principles, we hold it was error for the trial judge to deny the solicitor and defense counsel the right to examine prospective jurors concerning their moral or religious scruples, beliefs, and attitudes toward capital punishment. Both the State and the defendant were thus deprived of the right to exercise intelligently their peremptory challenges and their challenges for cause. This assignment is sustained and requires a new trial.

Defendant contends it was error for the trial judge to preclude mention of the death penalty during the cross-examination of Peanut Mitchell.

The record discloses that defendant was permitted to cross-examine Mitchell with respect to his plea bargaining and the fact that he was originally charged with first degree murder. Mitchell testified on cross-examination in regard to this matter as follows: "I have not been sentenced for murder in the Sloop robbery murder. I don't know when I will be sentenced. I was originally charged with murder and have entered a plea of guilty of murder in the second degree, which is a different charge from that with which I was first charged."

[11] "Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party." State v. Hart, 239 N.C. 709, 80 S.E.2d 901 (1954).

[12] "While latitude is allowed in showing the bias, hostility, corruption, prejudice and interest or misconduct of the witness with respect to the case or other facts tending to prove that his testimony is unworthy of credit, 3 Jones on Evidence, 1538, the question as to the extent to which the cross-examination may extend is to be determined with a view to the discretion of the trial judge. Nevertheless, if the latter has excluded testimony which would clearly show bias, interest, the promise, or the hope of reward on the part of the witness, it is error and may be ground for a new trial. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; 3 Jones on Evidence, 1538. The discretionary power of the trial Judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness' testimony." State v. Roberson, 215 N.C. 784, 3 S.E.2d 277 (1939).

[13] The pressures which induced Peanut Mitchell to plead guilty to second degree murder and to testify for the State against a co-conspirator are material and have a substantial bearing upon the credibility to be given his testimony, and are permissible subjects for cross-examination. It is logical to assume that one very important factor which may have influenced Mitchell's decision to cooperate with the State was the possibility that had he been tried for first degree murder, he might have been convicted and sentenced to death. Because the question of Mitchell's credibility and bias is of such vast importance in this case, we hold it was error for the scope of cross-examination to be limited so as to exclude all mention of the death penalty.

We deem it unnecessary to discuss other assignments of error relating to recall of a witness and to instructions given by the court, in response to a juror's question, alleged by defendant to contradict instructions initially given. These are matters not likely to arise on retrial.

For error committed with respect to selection of the jury defendant is entitled to a new trial and it is so ordered.

New trial.